Supreme Court, U.S.
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No._____

In The

Supreme Court of the United States

October Term, Year 2001

ALAN MICHAEL LAWS

Petitioner,

v.

UNITED STATES

Respondent.

On Petition for Writ of Certiorari
from the United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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138 pp

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER A SEARCH WARRANT ISSUED ON JULY 21, 1993 OF THE LOGAN-LAWS FINANCIAL CORPORATIONS' JOHNSON CITY, TENNESSEE CORPORATE PREMISES WAS A GENERAL SEARCH WARRANT PROHIBITED BY THE UNITED STATES CONSTITUTION, FOURTH AMENDMENT.

II. WHETHER THE DISTRICT COURT'S REFUSAL TO ALLOW COUNSEL FOR MR. LAWS TO COMMUNICATE WITH JURORS AFTER IT WAS LEARNED THAT THE JURY ORGANIZED AND DELIBERATED PRIOR TO RECEIVING A JURY CHARGE WAS A VIOLATION OF THE UNITED STATES CONSTITUTION, FIFTH AND SIXTH AMENDMENTS.

PARTIES TO THE PROCEEDINGS

Petitioner

Alan Michael Laws, Petitioner is an individual and has no affiliations with any publicly traded corporation.

Respondent

United States of America

Other Parties

John M. Logan. A co-defendant who is an individual with no affiliations with any publicly traded corporation.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Alan Michael Laws, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit.

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OPINION BELOW

The United States Court of Appeals for the Sixth Circuit denied petitioner's brief on May 1, 2001. [App. at 2] A petition for rehearing *en banc* was also denied on June 21, 2001.

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STATEMENT OF THE BASIS OF JURISDICTION

Petitioner seeks a writ of certiorari from this Court to review the final decision by the United States Court of Appeals for the Sixth Circuit. This case originated in a criminal prosecution by the United States against petitioner on 95 counts of violations of 18 U.S.C. § § 1001, 1006, 287 and 371. Petitioner was convicted of 94 counts as charged in the indictment. A timely appeal was filed in the United States Court of Appeals for the Sixth Circuit.

On May 11, 2001, the Sixth Circuit denied relief to Petitioner. On May 25, 2001, petitioner filed a petition for rehearing and suggested a rehearing *en banc* with the Sixth Circuit, which was denied on June 21, 2001. This petition for writ certiorari follows.

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CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment IV
United States Constitution, Amendment V
United States Constitution, Amendment VI

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STATEMENT OF FACTS

The two issues petitioned for review are whether a search warrant was a general warrant and whether counsel should have been allowed to communicate with jurors after the trial. Each of these issues will be discussed *seriatim.*

I. THE SEARCH WARRANT

The petitioner, Mr. Laws, was a fifty percent of Logan-Laws Financial Corporation ("LLFC"), and from January to July 1993 was also the President of LLFC. The LLFC was a Tennessee corporation which made loans co-insured by the Federal Housing Administration of the Department of Housing

and Urban Development ("HUD/FHA"). Prior to July 21, 1993, LLFC chiefly operated at a corporate structure at 500 Princeton Road in Johnson City, Tennessee. This structure contained the main body of LLFC, including the work place of 125 employees.

On July 21, 1993, Special Agent Derek B. Johnson, Federal Bureau of Investigation, prepared an application and affidavit for a search warrant of LLFC's premises. Upon review of the application and affidavit, United States District Judge Thomas G. Hull issued a search warrant. The warrant authorized the following items to be seized from the LLFC corporate premises as followed:

> 1) Information and/or data stored in the form of magnetic or electronic coding on computer media or in media capable of being read by a computer or with the aid of computer related equipment. This media includes but is not limited to floppy diskettes, fixed hard disks, removable hard disk cartridges, tapes, laser disks, video cassettes, and any other media which is capable of storing magnetic coding.
> 2) Electronic devices which are capable of analyzing, creating, displaying, converting, or transmitting electronic or magnetic computer impulses or data. These devices include but are not limited to computers, computer components, computer peripherals, word processing equipment, modems, monitors, printers, plotters, encryption circuit boards, optical scanners,

external hard drives and other computer related electronic devices.

3) Instructions or programs in the form of electronic or magnetic media which are capable of being interpreted by a computer or related components. The items to be seized could include but would not be limited to operating systems, application software, utility programs, compilers, interpreters, and any other programs peripherals either directly or indirectly via telephone lines, radio, or other means of transmission.

4) Printed material which provide instructions or examples concerning the operation of a computer system, computer software, and/or any related device.

5) Telephone long distance call records and records of wire and electronic interstate communications.

6) Records, files, documents, notes, correspondence, microfiche, or computerized entries concerning the Department of Housing and Urban Development (HUD), Government National Mortgage Association (GNMA), Federal Housing Administration (FHA), manufactured home dealers, borrowers both past and present, payment history and current loan status of borrowers, loan files and accounts of borrowers, loan applications, and copies of submissions to FHA, GNMA, HUD, FHA insurance claims and claims records.

7) Accounts receivable and records thereof.

8) Retained copies of documents relating to banking transactions, including but not limited to:

(1) retained copies of signature cards;

(2) bank statements;
(3) canceled checks;
(4) deposit tickets;
(5) retained copies of items deposited;
(6) retained copies of credit and debit memos.

9) Bank correspondence files.

10) Documents in books of original entry containing entries reflecting any and all transactions, including but not limited to General ledgers, General journals, Subsidiary ledgers, including but not limited to loan loss account ledgers, trial balances, Summary journals including but not limited to cash receipts and cash disbursements, Daily posting records and slips, check request forms, "special handling accounts" and "special handling account" reports.

11) Internal documents or instructions to employees, representatives or agents concerning GNMA, FHA, borrowers or manufactured homes dealers, personal and informal files, notes, diaries, telephone call logs and telephone records, calendars and working papers of employees and officers of Logan-Laws, Articles of incorporation, or Partnerships.

12) All of the above listed documents may be found in written or electronic form.

[Search warrant, App. at 60]

These descriptions encompassed all of the documents and information within the LLFC building.

On July 23, 1993, on the authority of this warrant, the FBI began an extensive sweeping search of the entire Logan-Laws' premises. FBI agents, accountants from HUD, and other federal employees made a thorough search of the LLFC's premises, seizing a vast assortment of files, papers and electronic data, including 787 megabytes of computer data downloaded from the Logan-Laws' networked computer files.

Prior to the trial, petitioner filed motions to suppress all documents, items and information seized during the search of LLFC because the warrant was a "general warrant" and "effectively authorized a seizure of almost every single piece of paper or piece of information in the Logan-Laws' corporate building."

The district court referred this motion to Magistrate Judge Dennis H. Inman for report and recommendation. After an evidentiary hearing, Magistrate Judge Inman concluded that the warrant was not general and stated:

> This warrant was broad, to be sure, but it was not 'general.' The warrant was rather specific about what could be searched and seized. Although the description encompassed virtually all of the business records of the corporation, that does not mean the warrant lacked particularity; it simply means that it was extremely broad. The issue therefore, is 'whether there was probable cause to support a

> search of this breadth, not whether the warrant was general.'

Magistrate Judge Inman found that all documents seized by the FBI were potentially probative of criminal conduct and denied the motion to suppress evidence.

Petitioner filed timely objections to the Report and Recommendation. The district court denied these objections and adopted the Report and Recommendation of the Magistrate Judge in its entirety. Although acknowledging that there were "mountains of paper work, evidence in unknown forms," the district court found that the warrant describing a general class of items relating to HUD/FHA and GNMA transactions and loan payments was "as specific as possible, and thus reasonable under the circumstances." [App. at 66]

Upon conviction, Mr. Laws timely appealed all evidentiary rulings of the district court in the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit affirmed the district court's ruling that the search warrant in question was not general. The Sixth Circuit found that the search warrant in question was not a general warrant because:

> [t]he investigator's belie[ved] that granting HUD/FHA co-insured loans and GNMA mortgage-backed securities constituted the LLFC's entire operation. That being the case, law enforcement officials were necessarily

> involved in an extensive paper trail in order to discover which transactions may have been illegal in nature. Keeping in mind the particularity requirement is determined relative to this specific circumstance in each case, we find that the items sought in light of the illegal activity alleged were appropriate. The warrant specified that the items sought were those related to HUD/FHA lending and GNMA securities and, as such, did not violate the particularly requirement of the Fourth Amendments."

United States v. Logan, 250 F.3d 350 (6th Cir. 2001).

Finally, the Sixth Circuit found that even if the warrant was a general warrant, the district court was correct in denying motions to suppress under the good faith exception to the exclusionary rule outlined in *United States v. Leon,* 468 U.S. 897, 918-21 (1984). The Sixth Circuit found that law enforcement agents could have reasonably relied on the face of the search warrant issued by United States District Court Judge Thomas G. Hull and, because there was no evidence of bad faith, the execution of the warrant was reasonable.

On June 21, 2001, the Sixth Circuit denied petitioner's petition for rehearing *en banc* under the validity of the search warrant. This petition for writ of certiorari followed.

II. COMMUNICATION WITH THE JURY

After conclusion of the trial and jury verdict, the district court gave these final words to the jury and to the lawyers in the courtroom:

> The Court: We will release you to go now. You don't have to discuss this case with anyone unless you wish, unless you want to; and if these lawyers have any other cases involving your jury panel, they know not to discuss it with you until after your time has been released; so with that, we give you our thanks. We let you go.

[Trial transcript, dated May 14, 1998 at 10:50 a.m.]

Counsel, believing this statement allowed permission to talk to the jurors following the trial of this case, spoke with the jury foreman after the trial was over. At that time, it was learned that the jury had organized early in the course of this five week trial; had selected a jury foreman; had discussed the proof on a daily basis; and had discussed the guilt or innocence of the defendants, all of which occurred prior to the jury charge by the district court.

Following this communication, and out of an abundance of caution, counsel for petitioner filed a motion for permission to communicate with the jurors in light of Local Rule 48.1 for the Eastern District of Tennessee, which provides:

> No attorney, party or representative of either may interrogate a juror after a verdict has been returned or the trial has been otherwise concluded without prior permission of the court.

[App. at 102]

The district court denied this motion to communicate with jurors, stating that "defendant Laws did not allege any juror misconduct during the trial, and does not allege any now." [App. at 85, 87]

In response to the district court's ruling, petitioner filed a motion to alter or amend the district court's Order denying permission to interview the jurors. This motion included the affidavit of counsel for petitioner, Robert W. Ritchie, which stated that during a communication that Mr. Ritchie had with the jury foreman, it was learned that the jury routinely discussed evidence among themselves during the course of the entire trial, prior to the close of evidence and prior to being advised of the appropriate jury instructions. [App. at 88, and 93]

On July 29, 1999, the district court again denied, in a margin notation, petitioner's motion to alter or amend its prior ruling and denied permission to interview any of the jurors in this case. [App. at 91]

Upon timely appeal to the United States Court of Appeals for the Sixth Circuit, the Sixth Circuit, relying primarily

upon Federal Rules of Evidence 606(b), affirmed the district court's denial of petitioner's motion to communicate with the jurors. Citing the "integrity of the jury," and the Sixth Circuit's belief that the petitioner was challenging the verdict in this case due to jury misconduct, the Sixth Circuit affirmed the district court's denial of petitioner's request to communicate with any jurors in this case.

The United States Court of Appeals denied petitioner's petition for rehearing *en banc* on June 21, 2001.

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER A SEARCH WARRANT ISSUED ON JULY 23, 1993 OF THE LOGAN-LAWS FINANCIAL CORPORATIONS' JOHNSON CITY, TENNESSEE CORPORATE PREMISES WAS A GENERAL SEARCH WARRANT PROHIBITED BY THE UNITED STATES CONSTITUTION, FOURTH AMENDMENT.

II. WHETHER THE DISTRICT COURT'S REFUSAL TO ALLOW COUNSEL FOR MR. LAWS TO COMMUNICATE WITH JURORS AFTER IT WAS LEARNED THAT THE JURY ORGANIZED AND DELIBERATED PRIOR TO RECEIVING A JURY CHARGE WAS A VIOLATION OF THE UNITED STATES CONSTITUTION, FIFTH AND SIXTH AMENDMENTS.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE SPLIT BETWEEN THE SIXTH AND NINTH CIRCUITS' INTERPRETATIONS OF THE FOURTH AMENDMENT'S REQUIREMENT THAT SEARCH WARRANTS BE "PARTICULARIZED."

The search warrant used to search the premises at 500 Princeton Road, Johnson City, Tennessee [App. at 60] on July 23, 1993 was a general warrant.

The Fourth Amendment to the United States Constitution requires that search warrants describe with particularity "the place to be searched and the persons or things to be seized." *Dalia v. United States*, 441 U.S. 238, 255, 99 S.Ct. 1682, 60 L.Ed.2d 177 (1979); *Coolidge v. New Hampshire*, 403 U.S. 443, 467, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971). General warrants are search warrants that fail to describe with particularity the things to be searched for and seized and "create a danger of unlimited discretion in the executing officer's determination of what is subject to seizure and danger of items that will be seized when the warrant refers to other items." *United States v. Savoca*, 761 F.2d 292, 298-99 (6th Cir. 1984), *cert. denied* 474 U.S. 852 (1985). *See Andresen v. Maryland*, 427 U.S. 463, 49 L.Ed.2d 627, 96 S.Ct. 2737 (1976). At an "[i]rreducible minimum, a proper warrant must allow the executing officers to distinguish between items that may and

may not be seized." *United States v. Leary,* 846 F.2d 592, 602 (10th Cir. 1988).

The warrant at issue here covered every tangible and intangible piece of information of document at the Logan-Laws' premises. It authorized the seizure of almost every single piece of information on the LLFC's premises, including all magnetic or electronic coding or data on computers, electronic devices, instructions and software, all printed material, telephone records, records, files, documents, notes, correspondence, microfiche, computerized entries concerning HUD, GNMA or FHA, accounts receivable or records thereof, retained copies of banking transactions, bank correspondence files, general ledgers, general journals, subsidiary ledgers, check request forms, daily posting records and slips, internal documents or instructions to employees, calendars, working papers from employees and officers of LLFC, and articles of corporation with little or no restriction, or whether it was on paper, microfiche, or any other electronic form. [App. at 60]

This warrant did not have any limits, temporal, descriptive, or otherwise. No time frame was given within the warrant describing dates of alleged activity of dates that documents seizure would be limited to. This warrant, on its face, was a general warrant. The only limit in the warrant that conceivably narrowed the scope of the search was the reference to GNMA, FHA and HUD documents under numbered paragraphs 6 and 11. [App. at 60] With no time constraint on this warrant, and little other restrictions, the government was

allowed "the virtual unlimited seizure of a lifetime's worth of documentation, which is extremely intrusive." *United States v. Ford*, 184 F.3d 566, 575 (6th Cir. 1999).

The district court, however, found that although the search warrant was broad, it was as narrow as the circumstances and the nature of the alleged crimes permitted and was not a general warrant. The district court denied Mr. Laws' motion to suppress evidence. [App. at 66]

The Sixth Circuit, affirming the district court, recited its standard for evaluating the generality and breath of search warrants, stating: "the degree of specificity required [in a search warrant] is flexible and will vary depending upon the crime involved and the types of items sought." *United States v. Logan*, 250 F.3d 350 (6th Cir. 2001) *(Citing United States v. Henson*, 848 F.2d 1374, 1382 (6th Cir. 1988)). "Thus, a description is valid if it is specific as the circumstances and the nature of the activity under investigation permit." *Henson*, 848 F.2d at 1382 (*citing United States v. Blum*, 753 F.2d 999, 1001 (11th Cir. 1985)). "Where the precise identity of the goods cannot be ascertained at the time of the warrant is issued, naming only the generic class of items will suffice." *Henson,* 848 F.2d at 1382 (citations omitted). *See also United States v. Blair,* 214 F.3d 690, 696 (6th Cir. 2000); *White Fabricating Co. v. United States,* 903 F.2d 404, 411 (6th Cir. 1990).

The Sixth Circuit rule, therefore, allows for search warrants that are not particularized, contrary to the clear language of the Fourth Amendment. The Sixth Circuit has carved out a hole in the Fourth Amendment's particularity clause based on the purported necessity and difficulty law enforcement has in particularizing documents relating to criminal activity. Because of this law enforcement necessity, the Sixth Circuit has reasoned, the government may seize complete masses of documentation from a corporation or business and *then* take the time to go through it fishing for evidence of crime.

Contrary to the Sixth Circuit's "flexible" standard, the United States Court of Appeals for the Ninth Circuit has applied a stricter standard, finding the precise same type of warrants unconstitutional. *See United States v. Kow,* 58 F.3d 423, 426 (9th Cir. 1995); *Center Art Galleries-Hawaii v. United States,* 875 F.2d 747, 750 (9th Cir. 1989). The Ninth Circuit's rule requires the government to make a showing *before obtaining* a search warrant that the criminal activity "was inseparable from the other business documents or that the business was permeated with the fraud." *See Center Art Galleries,* 875 F.2d at 751; *United States v. Washington*, 797 F.2d 1461, 1473 (9th Cir. 1986).

Indeed, in *United States v. Kow, supra*, the Ninth Circuit Court of Appeals found a strikingly similar warrant to be a general warrant held that:

> The warrant authorized the seizure of virtually every document and computer file at HK Video. To the extent that it provided any guidance to the officers executing the warrant, the warrant apparently sought to describe every document on the premises and direct that everything be seized. The government emphasizes that the warrant outlined fourteen separate categories of business records. However, *the warrant contained no limitations on which documents within each category could be seized or suggested how they related to specific criminal activity.* By failing to describe with any particularity the items to be seized, the warrant is indistinguishable from the general warrants repeatedly held by this court to be unconstitutional. *E.g., Center Art Galleries-Hawaii, Inc. v. United States,* 875 F.2d 747, 750 (9th Cir. 1989); *United States v. Stubbs*, 873 F.2d 210, 211 (9th Cir. 1989) (warrant invalid "because of the complete lack of any standard by which an executing officer could determine what to seize"). (Emphasis added)

Kow, 58 F.3d at 427.

As for the government's necessity, the Ninth Circuit stated that:

> To the extent that it was difficult for the government to create a more particularized warrant, the government may be to blame. Like the District Court, we are troubled by the "government's decision to refrain from further investigation such as the audit done in (*United States v. Michaelian*, 803 F.2d 1042 (9th Cir. 1986), and yet rely on the lack of specific information to justify the lack of particularity in the warrant.

Kow, 58 F.3d at 427, n.2

The Ninth Circuit requires that before a warrant can have broad descriptions of documents and lack specificity and particularity, the government must make a showing *when obtaining* a search warrant that it was unable to particularize further. Certainly this holding is more consistent with the strictures of the Fourth Amendment's particularity clause then the after-the-fact flexibility allowed the government in the Sixth Circuit.

The Sixth and Ninth Circuits, accordingly, disagree as to the particular standard to use in reviewing the generality and breadth of these type of business search warrants. This split was recognized by the United States Court of Appeals for the Fourth Circuit in *United States v. Oloyede*, 982 F.2d 133, 140 (4th Cir. 1993). In *Oloyede*, the Fourth Circuit noted the Ninth Circuit's rule requiring law enforcement to describe at the time that they

obtained the search warrant that the business was permeated with fraud or that the documents were inseparable from other documents. *Oloyede*, 982 F.2d at 140. Although the Fourth Circuit declined to follow the Ninth Circuit, it was clear from *Oloyede* that there was a clear difference between the Fourth and Ninth Circuits, and similarly the Sixth and Ninth Circuits. *Oloyede*, 982 F.2d at 140.

Furthermore even under the Sixth Circuit standard, the record reflects that the government *did not have this necessity to ask for such a general warrant.* Much like the Ninth Circuit case *Kow*, *supra,* the records reflects the government was able to particularize this search warrant through the use of an administrative audit. After the search of this case, counsel for the petitioner deposed the HUD auditors that were present during the execution of the search warrant on the LLFC premises. It was learned that these same HUD auditors originally planned on conducting an audit of the LLFC in May or June of 1993. Instead, the FBI contacted the auditor's supervisor and told him to postpone the audit until July so that the auditors could help the HUD auditors during the search. Thus, a regulatory audit – the surest method that the FBI had to obtain the specific and current information necessary to specifically describe what to seize in the search warrant affidavit – was deliberately canceled.

Moreover, the FBI possessed HUD audit information from prior audits as well. These audits indicated loan files questionable to HUD with the names of borrowers and specific

files. The FBI also possessed computer printouts of "special handling" accounts within LLFC, later to be the source of multiple charges against the petitioner.

The affidavit from FBI Special Agent Derek Johnson did little to clarify and limit the search warrant itself. The affidavit contained a wealth of stale information. At ¶ 20, Leisa Ann Taedlock's information was given to Special Agent Smith 21 months before the search warrant was sought. Moreover, she had not been employed at LLFC since 1989, 4 ½ years before the search. At ¶21, C1's information as transmitted to Johnson is 10 months stale. At ¶23, CCW2 provided the listed information on June 12, 1993, but the information was actually at least 11 months old. At ¶25, the government describes information derived from Iva Jean Lewis, an employee fired almost *four years* before the affidavit executed.

All of this reflects that the government could have particularized this particular search warrant. Nothing in the record reflects a sense of urgency that may have precipitated the need for seizure of all of the corporate records. There is nothing in the record reflecting destruction of evidence or that the Logan-Laws Corporation even knew it was being investigated. Certainly, the staleness of the information in the search warrant affidavit reflects no hurry or emergency by the government. The circumstances and nature of the crime here reflect that the government could have particularized the search warrant further, but declined to do so in an effort to ease their burden and seize as much as possible from the LLFC premises.

Moreover, nether the affidavit or the search warrant here implicitly or explicitly supported the finding that the LLFC was permeated with fraud, or that the documents were inseparable from other documents in relation to alleged criminal activity. The Ninth Circuit would have found this warrant unconstitutional under its rule because no proper showing was made in obtaining this warrant. The Sixth Circuit, conversely, allowed the government more flexibility in obtaining this general warrant, and has found the search warrant here to be constitutional.

The petitioner submits that this Court should review the search warrant and affidavit of this case and determine whether a particularity standard of the United States Constitution, Fourth Amendment was violated by the United States in executing this search warrant. This Court should take this opportunity to resolve this split in interpretation of the Fourth Amendment by the Ninth and Sixth Circuits and articulate a clear standard to limit governmental intrusion into citizen's businesses, consistent with the precise language.

The decision of the Court of Appeals in this case also cited *United States v. Leon,* 468 U.S. 896, 918-921, 164 S.Ct. 3405, 82 L.Ed.2d 677 (1984) for the proposition that even if this particular search warrant lacked particularity, the good faith exception to the exclusionary rule would not require the suppression of the fruits of that search. While the decision lists some of the exceptions to the good faith standard, it obviously

does not list the exception for a warrant that is so broad as to be invalid on its face.

Indeed, there is no indication at all that the Court of Appeals considered the statement by the Court in *Leon, supra*, that:

> [A] warrant may be so facially deficient – i.e., in failing to particularize the places to be searched or the things to be seized that the executing officers cannot presume it to be valid.

Leon, 46 U.S. at 923, 104 S.Ct. at 3421.

Therefore, for the same reasons the petitioner insists that the search warrant in this case is invalid, he also submits that the good faith exception to the exclusionary rule is likewise inapplicable.

II. THIS COURT SHOULD ESTABLISH A RULE CONSISTENT WITH THE CONSTITUTION TO DETERMINE WHEN JURORS CAN BE COMMUNICATED WITH AFTER TRIAL.

The petitioner's Fifth and Sixth Amendment rights were violated when the district court refused to allow his counsel to interview the jurors after the trial of this case.

The district court, relying on Rule 606(b), Fed. R. Evid. and Local Rule 48.1 of the United States Court of the Eastern District of Tennessee, denied Mr. Laws' motion to communicate with the jurors. [App. at 85] On appeal, the Sixth Circuit, relying on the same rules, declined to find that the district court abused its discretion in denying counsel communications with the jurors after the trial was completed. The Sixth Circuit found that the showing made by Mr. Laws that the jury had organized, selected a foreman, and had discussed the evidence regularly throughout the course of the trial, prior to being given a jury charge, was an "internal" jury issue, and therefore, no jurors could testify as to the validity of the verdict under Rule 606(b), Fed. R. Evid. Therefore, the Sixth Circuit reasoned, there was no reason to inquire as to potential juror misconduct. *United States v. Logan*, 250 F.3d 350 (6th Cir. 2001).

It is well-settled that when there is a showing of misconduct by the jury, the district court has a responsibility to investigate the matter to determine what type of misconduct could have taken place. *See Remmer v. United States,* 347 U.S. 227 (1954). *See also United States v. Corrado*, 227 F.3d 543, 552 (6th Cir. 2000); *United States v. Chavis,* 772 F.2d 100, 110 (5th Cir. 1985); *United States v. Eldredd*, 588 F.2d 746, 752 (9th Cir. 1978).

Mr. Laws, through affidavit of counsel, made a showing that the jurors deliberated on the verdict of his guilt or innocence prior to being given the charge and read the law of the case. The affidavit of trial counsel, Robert W. Ritchie, was submitted

supporting a showing of the reasons why communication was necessary. [App. at 93] Counsel learned that the jurors routinely discussed the evidence during the course of the entire trial and prior to having been given a juror charge of the law.

These pre-deliberation discussions violated Mr. Laws' right to a fair trial before an impartial jury. *See, e.g., United States v. Resko,* 3 F.3d 684, 695 (3d Cir. 1993) (and reasons cited therein); *United States v. Wiesner*, 789 F.2d 1264, n.3 (7th Cir. 1986) (requiring instruction not to deliberate prior to presentation of all of the evidence); Hardwick & Ware, Juror Misconduct § 7.04, at 7-27 (1988); Propriety and Effect of Juror's Discussion of Evidence Among Themselves Before Final Submission of Criminal Case, 21 ALR 4th (and cases cited therein).

The constitutional violation, however, was exacerbated by the summary denial of the petitioner's motion, without hearing, and the refusal to allow petitioner permission to contact or communicate with the jurors in any way. No hearing or findings were made by the district court at all. No investigation was had by the district court, nor was any allowed.

The district court and the Sixth Circuit failed to follow this Court's ruling in *Remmer v. United States,* 347 U.S. 227 (1954). In *Remmer*, this Court required the trial court to take action upon receipt of information that could relate to jury misconduct in order to "determine the circumstances, the impact thereof on the juror, and whether or not it was prejudicial in a

hearing with all interested parties to participate." *Remmer*, 347 U.S. at 230. *Remmer* still defines the "nature and scope of the investigation required when jury misconduct is credibly alleged." *Remmer, 347 U.S. 227. See United States v. Corrado*, 227 F.3d 543, 551 (6th Cir. 2000).

Counsel asks this Court to review the lower courts' determination that prevented any communication with the jurors. There would be no other way to determine whether any misconduct occurred or whether the petitioner suffered any prejudice from any misconduct. The only way to determine that would be to allow contact with the jurors, at least by the district court. As this Court held in *Remmer*, some investigation must be had by the trial court to determine the type, nature and degree of alleged misconduct after a showing has been made. The affidavit of Robert W. Ritchie [App. at 93] is more than adequate showing that some misconduct occurred on the part of the jury.

This Court should grant *certiorari* on this issue to elaborate on what requirements the trial court has to determine the type, nature and degree of jury misconduct when a proper showing has been made by a defendant. To apply a prophylactic protection of the jurors and disallow any communication by counsel of the petitioner to communicate with the jurors infringes upon the petitioner's Fifth and Sixth Amendment rights to a fair trial by an impartial jury.

CONCLUSION

For the above reasons, petitioner, Alan Michael Laws respectfully prays that this Honorable Court grant this petition for writ of certiorari.

Respectfully submitted,

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Counsel for Petitioner

App. 1

No._____

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In The

Supreme Court of the United States

October Term, Year 2001

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ALAN MICHAEL LAWS

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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Petition For A Writ of Certiorari
From the United States Court of Appeals
for the Sixth Circuit

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APPENDIX

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App. 2

United States Court of Appeals,
Sixth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
John M. LOGAN (99-6176); **Alan Michael Laws** (99-6198),
Defendants-Appellants.

Nos. 99-6176, 99-6198.

Argued Jan. 31, 2001.
Decided and Filed May 11, 2001.

Shareholders and controlling officers of lender making government-insured mobile home loans and issuing mortgage-backed securities were convicted in the United States District Court for the Eastern District of Tennessee, James H. Jarvis, J., on 94 counts, which included making false statements, false entries, false claims, and one count of conspiracy, and they appealed. The Court of Appeals, Nugent, District Judge, sitting by designation, held that: (1) materiality is not an element of the offense under the false claims statute; (2) in any event, the evidence was sufficient; (3) reporting payments to borrowers' accounts when the payments were made out of lender's own funds supported false entry convictions; (4) search warrant for records, files, and documents was not a general warrant; (5) Rule of Evidence barring admission of compromise and offers to compromise does not prohibit admission of administrative or civil settlement negotiations in a criminal context; (6) evidence of defendants' income from lender and related corporations was relevant; (7) loss computations were

proper; (8) prior misdemeanor DUI conviction was properly included in one defendant's criminal history; and (9) the district court correctly denied defendants' motion for permission to conduct a post-verdict interrogation of jurors.
Affirmed.

M. Neil Smith (argued and briefed), Asst. U.S. Atty., Greeneville, TN, for Plaintiff-Appellee.

John T. Milburn Rogers, Jerry W. Laughlin (argued and briefed), Rogers, Laughlin, Nunnally, Hood & Crum, Greeneville, TN, for Defendant-Appellant in No. 99-6176.

Robert W. Ritchie (argued and briefed), W. Thomas Dillard (briefed), Richard L. Gaines, Ritchie, Fels & Dillard, Knoxville, TN, for Defendant- Appellant in No. 99-6198.

Before: MARTIN, Chief Judge; COLE, Circuit Judge; NUGENT, District Judge. [FN*]

FN* The Honorable Donald C. Nugent, United States District Judge for the Northern District of Ohio, sitting by designation.

OPINION

NUGENT, District Judge.

Appellants **John M. Logan** and **Alan Michael Laws** were found guilty by a jury sitting in the United States District Court for the Eastern District of Tennessee on ninety-four counts of criminal charges, which included making false statements, false entries, false claims, and one count of conspiracy. Appellants filed a timely notice of appeal to this Court, challenging their convictions and the corresponding sentences. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 to review the final judgment of the district court and pursuant to 18 U.S.C. § 3742(a) to review the sentence imposed. For the reasons set forth below, we hereby AFFIRM the judgment reached and sentences imposed by the district court.

I. BACKGROUND

Appellants in this case are the sole shareholders and controlling officers of Logan-Laws Financial Corporation ("LLFC"), an entity which made mortgage loans co-insured by the Federal Housing Administration of the Department of Housing and Urban Development ("HUD/FHA"). Through LLFC, Appellants issued securities backed by pools of federally insured mortgages to secondary market purchasers under the Government National Mortgage Association's ("GNMA's") mortgage-backed securities program ("MBS program"). As an issuer of securities under the MBS program, LLFC was required to collect monthly principal and interest payments from property owners, which it passed through to the security holders, less servicing fees. In the event that a property owner failed to make a monthly payment, LLFC's role as a HUD/FHA co-insured lender required it to pay security holders from its own funds. If LLFC failed to make such payments, GNMA guaranteed payment to the security holders.

Thus, the United States, through GNMA, was ultimately responsible for the timely payment of principal and interest due on LLFC's mortgage-backed securities.

In connection with this practice, a grand jury returned a ninety-six count Indictment against Appellants, charging them with conspiring to defraud and commit offenses against the United States; making false claims to HUD/FHA; making false entries in reports to GNMA; making false statements to GNMA; and wire fraud. Prior to trial, one count of making false claims to HUD/FHA and the wire fraud count were dismissed. A jury convicted Appellants on each of the remaining Counts in the Indictment. Pursuant to the United States Sentencing Guidelines (the "Guidelines"), the district court sentenced Appellants to serve eighty-seven months of imprisonment, to be followed by three years of supervised release. In addition, the district court ordered Appellants to make restitution to HUD/FHA and GNMA in the amount of one million dollars.

In this Court, Appellants challenge both their convictions and sentences. More specifically, Appellants raise the following issues: (1) whether the search warrant executed by the government of LLFC's premises was a general warrant in violation of the Fourth Amendment of the United States Constitution; (2) whether there was sufficient evidence to find Appellants guilty of false claims; (3) whether there was sufficient evidence to find Appellants guilty of false entries or false statements; (4) whether there was sufficient evidence to demonstrate that there was a knowing and willing agreement between Appellants to commit a crime; (5) whether the district court erred in admitting evidence

of a settlement agreement between HUD/FHA and LLFC; (6) whether the district court erred in permitting the government to inquire as to Appellants' reported taxable income; (7) whether the district court incorrectly calculated loss under the Guidelines; (8) whether the district court improperly refused to depart downward from Appellant Laws's sentencing computation under the Guidelines; (9) whether the district court erred by enhancing Appellants' sentences for obstruction of justice; (10) whether the district court incorrectly calculated Appellant Laws's criminal history category under the Guidelines; and (11) whether the district court improperly refused to allow investigation of alleged jury misconduct. The Court considers each of these issues below.

II. DISCUSSION

The issues raised on appeal in this case generally fall into three categories. First, Appellants challenge the sufficiency of the evidence leading to their convictions. Next, Appellants assert that the district court erred in making several material evidentiary rulings. Finally, Appellants raise various challenges to the post-trial rulings made in the court below. We consider these categories in turn.

A. Sufficiency of the Evidence

In considering claims for sufficiency of the evidence to support a conviction, this Court, while reviewing the record in the light most favorable to the prosecution, should grant relief only if it is found that upon the record evidence adduced at trial, no rational trier of fact could have found proof of guilt beyond a

reasonable doubt. *See* Jackson v. Virginia, 443 U.S. 307, 324, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

1. False Claims Convictions

On appeal, Appellants argue that the evidence presented at trial was insufficient to support their convictions for making, or causing to be made, false HUD/FHA loan insurance claims under 18 U.S.C. § 287. Appellants contend that the false claims counts were based upon submission of either a Verification of Employment form ("VOE") or a Verification of Deposit form ("VOD"), neither of which satisfies the materiality requirement present in the false claims statute. Thus, Appellants argue that these forms, even if false, did not render the claims "false" within the meaning of the statute because the required element of materiality remains unsatisfied.

This Circuit first addressed the particular issue of whether materiality is an element of a false claims offense in United States v. Nash, 175 F.3d 429, 433-34 (6th Cir.1999). As in this case, the appellant in Nash argued that materiality is an element of this offense, and that because the government failed to prove that his statements were material, no rational trier of fact could find him guilty beyond a reasonable doubt of making false statements. Id. at 433.

In determining whether materiality was an element of the false claims statute in Nash, this Court first looked to the plain language of 18 U.S.C. § 287. That language provides:

> Whoever makes or presents to any person or officer in the civil, military, or naval service of

> the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.

Id. Based upon that section, this Court noted that the plain language neither mentions materiality nor in any way implies that the claim must be material. Nash, 175 F.3d at 434. Furthermore, we recognized that: (1) reading materiality into the statute would make surplusage of Congress's explicit use of the term in other statutes; (2) the legislative history of § 287 does not indicate that Congress intended to make materiality a necessary element of the statute; and (3) the requirement of materiality "would set up an incongruous 'heads I win, tails you lose' dichotomy." Id. This being the case, we made clear in Nash that the Sixth Circuit joined the Second, Fifth, Ninth, and Tenth Circuits in finding that materiality is not an element of 18 U.S.C. § 287. Id. On this basis alone, we find Appellants' argument concerning insufficiency of the evidence as to the false claims convictions to be entirely without merit. Under the law of this Circuit, materiality is not an element of an offense arising under 18 U.S.C. § 287.

Moreover, even if materiality were to be considered an element of this offense, the evidence was still sufficient to support Appellants' convictions under 18 U.S.C. § 287. That is, in light of the fact that the trial in the instant case took place pre-Nash, the jury was charged that materiality was required. [FN11] The jury found that the false VOEs and VODs were, in fact, material to

HUD/FHA's decision concerning whether to pay particular claims upon default. The record reveals that claims manager James Gibson testified at trial that the VOEs and VODs for the relevant claims were fraudulent. More specifically, Mr. Gibson explained that he, Appellants, or other LLFC employees forged the documents to make the loan files acceptable to HUD/FHA for payment on the loan insurance claims. J.A. at 1711-56. Furthermore, Allen Stailey, a marketing and outreach specialist for HUD, testified that because the program is primarily based on the creditworthiness of the borrower, it is critical that the lenders follow procedures and that they are truthful in the verification of employment and deposit information so that HUD/FHA can determine whether to pay on a particular claim. J.A. at 1779. Based upon this testimony, it was reasonable for the jury to conclude, as it did, that the contents of the VOEs and VODs were material to the HUD/FHA's decision as to whether to pay particular claims.

FN1. Specifically, the district court charged that the elements of 18 U.S.C. § 287 are as follows:

(1) that the defendant made or presented or caused to be made or presented to HUD a claim against the United States; (2) that at the time of this claim, HUD was a department or agency of the United States; (3) that the claim presented was fictitious or fraudulent in that the loan insurance claim contained false documents that were material to the claim; and (4) that the defendants knew that the claim was false, fictitious, or fraudulent. J.A. at 2223.

Appellants make much of the fact that neither the applicable regulations governing approval by a lender of a loan, nor the regulations governing the submission of a claim, specifically require that a VOE or VOD form be used or submitted. This technical argument amounts to nothing more than an unsuccessful attempt to circumvent the inevitable conclusion that Appellants submitted false documents in order to induce HUD/FHA to pay on certain loan insurance claims, regardless of the manner in which such information was submitted. In viewing the record in the light most favorable to the prosecution, the Court finds that the evidence adduced at trial was such that a rational trier of fact could have found proof of guilt beyond a reasonable doubt. For the above-stated reasons, the Court finds Appellants' argument concerning insufficiency of the evidence with respect to the false claims convictions to be without merit.

2. False Entries and False Statements Convictions

Appellants next assert that there was insufficient evidence adduced at trial upon which a rational jury could find them guilty of the offense of making false entries in reports under 18 U.S.C. § 1006. Similarly, Appellants argue that there is insufficient evidence to support a conviction for making false, fictitious, or fraudulent statements concerning material facts within the jurisdiction of GNMA in violation of 18 U.S.C. § 1001. The Court considers these arguments in turn.

Section 1006, entitled "Federal Credit Institution Entries, Reports and Transactions," provides, in pertinent part, the following:

> Whoever, being ... connected in any capacity with the ... Department of Housing and Urban Development ... with intent to defraud [the] institution ... or to deceive any officer, auditor, examiner or agent of [the] institution, ... makes any false entry in any book, report or statement of or to any such institution, or without being duly authorized, draws any order or bill of exchange, makes any acceptance, or issues, puts forth or assigns any note, debenture, bond or other obligation ... or, with intent to defraud the United States or any agency thereof ... participates or shares in or receives directly or indirectly any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of any such corporation, institution, or association, shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1006. Thus, the offense of making false entries under § 1006 requires that Appellants, while officers, agents, or employees of a lending corporation, acting pursuant to federal law and in a capacity connected with the GNMA of the HUD, with the intent to defraud such agencies, knowingly and willfully made or caused to be made false entries in reports to them.

In the instant case, the government alleged at trial that Appellants made false entries in Form 11710A reports, which provided information on pools of loans; in Form 11710D reports, which summarized all of the pools that LLFC issued during its existence;

and in letters from Appellant Logan to Guy Wilson, a Vice-President of GNMA, which repeated the information represented in the 11710A and 11710D forms. J.A. at 358. Appellants do not dispute the fact that, as an authorized Title I lender, LLFC was required to submit monthly reports to GNMA reflecting the status of each borrower's account on a Form 11710A and a Form 11710D. As in the court below, however, Appellants argue that the forms and letters were not false because the payments reflected therein were actually made to the borrowers' accounts, regardless of the fact that they were paid out of LLFC's own funds. On this basis, Appellants contend that the reports accurately reflect that a payment had been made and, therefore, were not false.

In United States v. Walker, 871 F.2d 1298, 1308 (6th Cir.1989), this Circuit made clear that "[a] statement may be false when it contains a half truth or when it conceals a material fact." In that case, we were faced with a similar situation, in which the appellant argued that the entries were not false because they recorded actual transactions as they occurred. Id. Nevertheless, the government "alleged and proved that the entries at issue were false because they failed to disclose that the loans were not made for the benefit of the named borrower and that the named borrower had not made the interest payments with his own funds." Id. On this basis, we upheld the false entries convictions. Id.

Here, the GNMA guidelines establish that the reports in question are required to reflect the payments that were actually received from the borrowers. According to the testimony presented at trial, GNMA requires lender reports to reflect actual payments from borrowers and the loan delinquency information because it needs to obtain a complete picture of how many loans were delinquent and how such delinquency affected the lender's

cash flow. J.A. at 1512A-1512B. In this way, GNMA is able to gauge the risk that it is undertaking with respect to each lender, and it is able to determine whether to allow the lender to continue participating in the program. *Id.* at 1512B. If the lender masks the number of delinquent loan payments by making the payments from its own funds, and thereby classifies such payments as actually received, the effect would be to deprive GNMA of the mandatory information it requires to assess continued relations with the lender. The record reflects that each witness who testified about the propriety of a lender making payments to the accounts of delinquent borrowers, with the exception of Appellants, explained that such a practice was not permitted pursuant to the GNMA guidelines and would have been done only to deceive GNMA about the lender's true loan delinquency rates. J.A. at 359. Viewing the record in the light most favorable to the prosecution, we find that the record evidence adduced at trial could have led a rational jury to find guilt beyond a reasonable doubt as to the false entries convictions.

Similarly, Appellants challenge their convictions for making false statements pursuant to 18 U.S.C. § 1001. That statute provides in part:

> whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully–
>
> (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
>
> (2) makes any materially false, fictitious, or fraudulent statement or representation; or

> (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;
> shall be fined under this title or imprisoned not more than 5 years, or both.

18 U.S.C. § 1001. In order to establish a violation of 18 U.S.C. § 1001, the government must demonstrate that: (1) the defendant made a statement; (2) the statement is false or fraudulent; (3) the statement is material; (4) the defendant made the statement knowingly and wilfully; and (5) the statement pertained to an activity within the jurisdiction of a federal agency. *See* United States v. Rogers, 118 F.3d 466, 470 (6th Cir.1997). A statement is material under § 1001 if it has the natural tendency to influence, or is capable of influencing, the federal agency. *See* United States v. Lutz, 154 F.3d 581, 588 (6th Cir.1998).

In this case, the statements at issue relate to letters from Appellants to Guy Wilson relating to LLFC's "DQ ratios." The DQ ratios are "an indicator of the loan delinquencies for a GNMA issuer's loan portfolio and were used by GNMA to determine whether authority to issue additional GNMA-guaranteed securities would be granted." J.A. at 360. These DQ ratios were determined from the loan delinquency information contained in the Form 11710A and the Form 11710D reports. The government contends that because these reports contained false loan delinquency information--brought about by LLFC making delinquent loan payments from its own funds--the DQ ratios submitted to Mr. Wilson based upon this information were also false.

At trial, Mr. Wilson testified that if LLFC's DQ ratios were not in proper compliance with GNMA standards, then GNMA was

going to end the commitment authority and not issue any more pools. J.A. at 1512C. He further explained that the result of masking the DQ ratios by making delinquent payments from its own funds allowed LLFC to falsely represent to GNMA that its delinquency rates were in compliance. J.A. at 1512C. In this way, LLFC allowed its commitment authority and the issuance of new pools to remain unchanged. We find that this testimony provides an adequate basis upon which the jury could find that the false representations were material and that GNMA relied on the statements in extending additional loan commitments to LLFC. Accordingly, viewing the record in the light most favorable to the prosecution, the evidence presented at trial could have led a rational jury to find Appellants guilty beyond a reasonable doubt as to the false entries convictions.

3. Conspiracy Convictions

Appellants further argue that there was insufficient evidence to establish the conspiracy convictions. More specifically, Appellants assert that the government failed to demonstrate that there was a knowing and willing agreement between them to commit a crime because there was insufficient evidence to support the underlying substantive claims. As discussed previously, the government produced sufficient evidence upon which a rational jury could find Appellants guilty beyond a reasonable doubt of making false entries, false claims, and false statements. The evidence produced by the government established that Appellants knowingly and voluntarily entered into an agreement to commit the underlying substantive offenses, and that they committed an overt act for the purpose of advancing or

helping the conspiracy. On this basis, the jury possessed a rational basis upon which it concluded that Appellants were guilty beyond a reasonable doubt of the crime of conspiracy.

B. Propriety of the Evidentiary Rulings

Appellants also raise several challenges to specific evidentiary rulings made by the district court. As an initial matter, Appellants argue that the district court erred in denying their motions to suppress evidence due to the alleged insufficiency of the search warrant that led to the discovery of such evidence. Furthermore, Appellants contend that the trial court improperly admitted into evidence a 1991 review by HUD's monitoring division, the resulting action by HUD's mortgagee review board, LLFC's July 1991 response to the mortgagee review board, and the settlement agreement and letter of reprimand disposing of the administrative action. In addition, Appellants state that the district court erred in permitting the government to inquire as to their amount of income gained from LLFC and related corporations. We now consider each of these arguments in turn.

1. Sufficiency of the Warrant

On July 21, 1996, [sic] Special Agent Derek B. Johnson of the Federal Bureau of Investigation prepared an application and affidavit for a search warrant of LLFC's premises. Special Agent Johnson sought the warrant after obtaining information indicating that LLFC regularly falsified loan documents filed with HUD/FHA and fraudulently manipulated its records to give the appearance that it was in compliance with GNMA requirements. Upon review

of the affidavit and application, United States District Judge Thomas G. Hull issued a search warrant. The warrant authorized the following items to be seized:

> 1) Information and/or data stored in the form of magnetic or electronic coding on computer media or in media capable of being read by a computer or with the aid of computer related equipment. This media includes but is not limited to floppy diskettes, fixed hard disks, removable hard disk cartridges, tapes, laser disks, video cassettes, and any other media which is capable of storing magnetic coding.
>
> 2) Electronic devices which are capable of analyzing, creating, displaying, converting, or transmitting electronic or magnetic computer impulses or data. These devices include but are not limited to computers, computer components, computer peripherals, word processing equipment, modems, monitors, printers, plotters, encryption circuit boards, optical scanners, external hard drives and other computer related electronic devices.
>
> 3) Instructions or programs in the form of electronic or magnetic media which are capable of being interpreted by a computer or related components. The items to be seized could include but would not be limited to operating systems, application software, utility programs, compilers, interpreters, and any other programs peripherals

either directly or indirectly via telephone lines, radio, or other means of transmission.

4) Printed material which provide [sic] instructions or examples concerning the operation of a computer system, computer software, and/or any related device.

5) Telephone long distance call records and records of wire and electronic interstate communications.

6) Records, files, documents, notes, correspondence, microfiche, or computerized entries concerning the Department of Housing and Urban Development (HUD), Government National Mortgage Association (GNMA), Federal Housing Administration (FHA), manufactured home dealers, borrowers both past and present, payment history and current loan status of borrowers, loan files and accounts of borrowers, loan applications, and copies of submissions to FHA, GNMA, HUD, FHA insurance claims and claims records.

7) Accounts receivable and records thereof.

8) Retained copies of documents relating to banking transactions, including but not limited to:

(1) retained copies of signature cards;

(2) bank statements;

(3) canceled checks;

(4) deposit tickets;

(5) retained copies of items deposited;

(6) retained copies of credit and debit memos.

9) Bank correspondence files.

10) Documents in books of original entry containing entries reflecting any and all transactions, including but not limited to General ledgers, General journals, Subsidiary ledgers, including but not limited to loan loss account ledgers, trial balances, Summary journals including but not limited to cash receipts and cash disbursements, Daily posting records and slips, check request forms, "special handling accounts" and "special handling account" reports.

11) Internal documents or instructions to employees, representatives or agents concerning GNMA, FHA, borrowers or manufactured homes dealers, personal and informal files, notes, diaries, telephone call logs and telephone records, calendars and working papers of employees and officers of Logan-Laws, Articles of incorporation, or Partnerships.

12) All of the above listed documents may be found in written or electronic form.

J.A. at 171-176. Thus, the warrant authorized agents of the government to search for and seize any records, files, and documents relating to the mobile home loans made by LLFC co-insured by HUD/FHA and upon which LLFC issued mortgage-backed securities pursuant to GNMA. The government agents executed the search warrant on July 26, 1996.

Prior to trial, Appellants filed motions to suppress the documents and items seized during the search of LLFC. In the motions, Appellants argued that the search warrant was "general" and that it "effectively authorized the seizure of almost every

single piece of paper or piece of information in the Logan-Laws corporate building." J.A. at 110. The district court referred the matter to Magistrate Judge Dennis H. Inman for report and recommendation. On February 14, 1997, Magistrate Judge Inman held an evidentiary hearing on, *inter alia,* the motions to suppress. Thereafter, the Magistrate Judge issued a report and recommendation concluding that the "warrant was, in light of the nature of the activity under investigation, and the manner of storing the information, as particular as it could be." J.A. at 112. Furthermore, the Magistrate Judge stated:

> This warrant was broad, to be sure, but it was not 'general.' The warrant was rather specific about what could be searched and seized. Although the description encompassed virtually all of the business records of the corporation, that does not mean that the warrant lacked particularity; it simply means that it was extremely broad. The issue, therefore, is 'whether there was probable cause to support a search of this breadth, not whether the warrant was general.'

J.A. at 112 (internal citation and quotations omitted). Finding that all records of the corporation relating to its HUD/FHA and GNMA activities were potentially probative of criminal conduct, Magistrate Judge Inman recommended that the district court deny the motions to suppress on the ground that there was probable cause to support a search of this breadth.

Appellants filed timely objections to the report and recommendation. The district court denied these objections and, consequently, adopted the report and recommendation in its

entirety. In a memorandum opinion, the district court found that the search warrant, though broad, attempted to uncover specific evidence of convoluted fraudulent activity, buried amidst mounds of paperwork and computer documentation. J.A. at 182. In addition, the district court stated the following:

> Because of the complex nature of the criminal scheme in the present case, the warrant could not have been more specific as to the identity of the documents to be seized. Even with the aid of the confidential informants who provided the information upon which the affidavit in support of the warrant was based, the officers could not have known precisely where and in what form documentation of this scheme existed. For example, according to the statements of one informant, the checks used to make payments to delinquent borrowers' accounts were returned to Logan-Laws and stored 'with other records ... in the second floor storage area,' which also housed all of the 'records dating to the beginning of the Logan-Laws Corporation.' These records also included, amidst mountains of paperwork, evidence, in unknown forms, of fraudulent loan payments and filings with FHA and GNMA. Hence, naming the general class of items, such as all documents relating to the HUD, FHA, and GNMA transactions and loan payments, was as specific as possible, and thus reasonable under the circumstances.

J.A. at 184 (internal citation omitted). Thus, the district court held that the warrant sufficiently stated the items to be seized, even though it effectively encompassed the bulk of the company's records. J.A. at 184.

Appellants contend that the district court should have declared the search warrant invalid because the description of the property did not meet the constitutional standards of particularity. They argue that the warrant was general in nature and, therefore, allowed for a general rummaging search. Furthermore, Appellants contend that the law enforcement officials seeking the warrant had specific information with which they could have limited the search to a significant degree but which they chose not to include in the warrant. Based upon these alleged deficiencies, Appellants state that the district court erred in denying their motions to suppress.

We review a district court's factual findings regarding motions to suppress for clear error and its legal conclusions *de novo*. *See* United States v. Blair, 214 F.3d 690, 696 (6th Cir.2000). In doing so, we extend great deference to a previous finding of probable cause for the issuance of the search warrant. *See* id. Thus, it is this Court's task to determine whether, in light of the totality of the circumstances, the judge issuing the warrant had a substantial basis for concluding that a search of the specified premises would uncover evidence of wrongdoing. *See* id.

The Fourth Amendment to the United States Constitution requires a warrant to "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. The purpose of this particularity requirement is to prevent the use of general warrants authorizing wide-ranging rummaging searches in violation of the Constitution's proscription against unreasonable searches and seizures. *See* Andresen v.

Maryland, 427 U.S. 463, 480, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976); United States v. Schultz, 14 F.3d 1093, 1098 (6th Cir.1994); *see also* United States v. Blakeney, 942 F.2d 1001, 1026 (6th Cir.1991) (recognizing that the warrant must enable a searcher to reasonably ascertain and identify the things which are authorized to be seized). This Court has recognized that the issue of whether a warrant is general, or lacks the requisite particularity, is best resolved upon examination of the circumstances of the particular case. *See* White Fabricating Co. v.. United States, 903 F.2d 404, 411 (6th Cir.1990); *see also* Blair, 214 F.3d at 697 (stating that "the degree of specificity in a warrant must be flexible, depending upon the type of items to be seized and the crime involved"); United States v. Henson, 848 F.2d 1374, 1383 (6th Cir.1988) (finding that the particularity required depends on the items sought and the specific circumstances in the case). A description contained in a warrant is sufficiently particular if it is as specific as the circumstances and the nature of the alleged crime permit. Blair, 214 F.3d at 697. In addition, once a category of documents has been adequately described in the warrant, in part by an illustrative list of items to be seized, the Fourth Amendment is not violated when officers executing the warrant exercise minimal judgment as to whether a particular document falls within the described category. *See* id.

In this case, we find that the lower court correctly determined that the search warrant satisfies the particularity requirement. The search warrant at issue authorizes the seizure of items specifically related to false or fraudulent activity taking place within the context of the HUD/FHA co-insured loans and the GNMA mortgage-backed securities. In particular, items such as records, files, documents, notes, correspondence, microfiche, or

computerized entries concerning HUD/FHA, GNMA, manufactured home dealers, borrowers both past and present, payment history and current loan status of borrowers, loan applications, and copies of submissions to FHA, GNMA, and HUD, FHA insurance claims, and other claims records could logically lead to evidence that Appellants were involved in the suspected illegal activity. Appellants' argument concerning the particularity requirement is based upon their position that investigating officers dug too deeply into the overall business of LLFC, instead of focusing on one portion of the operation that was alleged to have involved illegal practices. Appellants miss the point.

From the face of the search warrant and accompanying affidavit, it is clear that the warrant's general nature was due to the investigators' belief that granting HUD/FHA co-insured loans and GNMA mortgage-backed securities constituted LLFC's entire operation. That being the case, law enforcement officials were necessarily involved in an examination of an extensive paper trail in order to discover which transactions may have been illegal in nature. Keeping in mind that the particularity requirement is determined relative to the specific circumstances in each case, we find that the items sought in light of the illegal activity alleged were appropriate. The warrant specified that the items sought were those related to HUD/FHA lending and GNMA securities and, as such, did not violate the particularity requirement of the Fourth Amendment.

Furthermore, even if we were to find that the warrant lacked sufficient particularity under the Fourth Amendment, the district court would still have been correct in denying the motions to suppress under the good faith exception to the exclusionary rule

outlined in United States v. Leon, 468 U.S. 897, 918-21, 104 S.Ct. 3405 (1984). *See* Schultz, 14 F.3d at 1098. The good faith exception to the exclusionary rule states that the fruits of a constitutionally infirm search need not necessarily be suppressed unless: (1) the warrant contained a knowing or reckless falsehood; (2) the issuing judge acted as a mere "rubber stamp" for the police; or (3) the warrant and the affidavit, even after extending appropriate deference to the issuing judge's determination, did not establish probable cause or possessed a technical deficiency such that the executing officers cannot reasonably assume the warrant to be valid. Leon, 468 U.S. at 922-23, 104 S.Ct. 3405.

In the instant matter, there exists no evidence that Special Agent Johnson gave a knowingly false affidavit or otherwise acted in bad faith upon seeking the search warrant. The warrant was issued by a proper authority, namely United States District Judge Thomas G. Hull. Furthermore, the record is devoid of any evidence that Judge Hull abandoned his neutral role when he issued the warrant. Finally, we cannot say that this warrant was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." Schultz, 14 F.3d at 1098. This being the case, the officers' good faith reliance on the warrant in executing the search was, indeed, reasonable. Therefore, under either scenario, the evidence obtained from the search warrant at issue properly survived Appellants' motions to suppress.

2. Admission of the Settlement Agreement

Over Appellants' objections at trial, the district court admitted into evidence: (1) a 1991 review by HUD's monitoring division; (2) the resulting action by HUD's mortgagee review

board; (3) LLFC's July 1991 response to the mortgagee review board; and (4) the settlement agreement and letter of reprimand disposing of the administrative action. Appellants contend that the district court erred in admitting this evidence. In particular, Appellants argue that the admission of the settlement agreement was in violation of Federal Rules of Evidence ("Rules") 408, 404(b) and 403. The government asserts that the evidence was relevant, material, and admissible to demonstrate that Appellants were on notice of improprieties in their loan origination process and to explain one reason why Appellants were falsifying loan insurance claims.

We review the district court's admission of testimony or other evidence at trial for an abuse of discretion. *See* United States v. Talley, 164 F.3d 989, 998 (6th Cir.1999). An abuse of discretion exists only if this Court is firmly convinced that the district court has made a mistake. *See* United States v. Wiedyk, 71 F.3d 602, 608 (6th Cir.1995). This Court first considers Appellants' argument that the evidence in question was admitted in violation of Rule 408.

Rule 408 provides:

> Rule 408. Compromise and Offers to Compromise Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

> This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Fed.R.Evid. 408. The issue of whether Rule 408 serves to prohibit admission of administrative or civil settlement negotiations in a criminal context is one of first impression in this Circuit.

In ruling on motions for judgment of acquittal or, in the alternative, for a new trial, the district court held, without citation, that "Rule 408, which excludes evidence of compromise and settlements in a civil context, does not foreclose the use of this type of evidence in a criminal case." J.A. at 363. Several circuits, including the Second and Seventh Circuits, have confronted the question of whether Rule 408 applies to evidence of a settlement agreement sought to be admitted in a criminal matter. In each instance, the court held that Rule 408 is inapplicable to criminal cases.

The Second Circuit reached the conclusion that Rule 408 does not apply to criminal cases by looking to the plain language of the Rule. *See* United States v. Baker, 926 F.2d 179, 180 (2d Cir.1991) (finding it "fairly evident that the Rule applies only to civil litigation"). In reviewing the plain language, the court held that words such as "validity" and "claim" establish that the drafters of the Rule intended for it to apply solely in a civil context. *See* id. Furthermore, the Second Circuit has held that the primary policy

consideration that underlies the purpose of Rule 408, which is to encourage the settlement of civil cases, does not apply to criminal prosecutions. *See* Manko v. United States, 87 F.3d 50, 54 (2d Cir.1996); United States v. Gonzalez, 748 F.2d 74, 78 (2d Cir.1984); *see also* United States v. Peed, 714 F.2d 7, 10 (4th Cir.1983) (holding that Rule 408 was inapplicable in the context of a criminal case because the negotiations at issue "were not negotiations aimed at settling a civil claim, negotiations that the policy behind Rule 408 seeks to encourage").

Similarly, the Seventh Circuit held that the plain language of Rule 408 reflects that it applies only to civil cases, "specifically the language concerning validity and amount of a claim." United States v. Prewitt, 34 F.3d 436, 439 (7th Cir.1994). In addition, the court recognized that nothing in Rule 408 particularly circumscribes the use of evidence of settlement negotiations with a private party in the context of a criminal case. *See* id. Finding that the public interest in the prosecution of crime is greater than the public interest in the settlement of civil disputes, the court made clear that the law in the Seventh Circuit provides that Rule 408 should not be applied to criminal cases. *See* id.

We find that the cases that exist in the Second and Seventh Circuits are correct in concluding that the plain language of Rule 408 makes it inapplicable in the criminal context. Although this conclusion arguably may have a chilling effect on administrative or civil settlement negotiations in cases where parallel civil and criminal proceedings are possible, we find that this risk is heavily outweighed by the public interest in prosecuting criminal matters. Based upon the foregoing, we conclude, as have the Second and Seventh Circuits, that Rule 408 does not serve to prohibit the use of evidence from settlement negotiations in a criminal case.

Next, we turn to Appellants' argument that the 1991 review by HUD's monitoring division, the resulting action by HUD's mortgagee review board, LLFC's July 1991 response to the mortgagee review board, and the settlement agreement and letter of reprimand disposing of the administrative action were inadmissible pursuant to Rule 404(b). That Rule provides, in pertinent part:

> Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes
>
> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Fed.R.Evid. 404(b). On appeal, Appellee contends that these documents were properly admitted to prove knowledge and intent to defraud.

In United States v. Gold Unlimited, Inc., 177 F.3d 472, 488 (6th Cir.1999), this Court set out a three-part test for the admission of evidence under Rule 404(b). In that case, we stated:

> This court requires a district court to make three findings before the district court admits evidence under Federal Rule of Evidence 404(b). The district court must find that the prior bad acts occurred (a finding reviewed for clear error); that the evidence helps prove a material issue (a finding reviewed de novo); and that the evidence passes the balancing test of Rule 403 (a finding reviewed for abuse of discretion).

Id. (citing United States v. Jobson, 102 F.3d 214, 220 (6th Cir.1996)). Appellants do not contest the first or second elements, implicitly admitting that the bad acts transpired and that the evidence helps to prove a material issue. Instead, Appellants direct their argument to the third element, claiming that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury under Rule 403.

Rule 403 states the following:

> Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time
>
> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed.R.Evid. 403. In reviewing Rule 403 challenges to the district court's decision to admit certain evidence, we view the

evidence in the light most favorable to the prosecution. *See* United States v. Sanders, 95 F.3d 449 (6th Cir.1996). As such, we maximize the probative value of the evidence and minimize its potential prejudice to the defendant. *See* id. The prejudice noted by the court is only the unfair prejudice against the defendant caused by the admission of the evidence. *See* id. Accordingly, "[e]vidence that is prejudicial only in the sense that it paints the defendant in a bad light is not unfairly prejudicial pursuant to Rule 403." Id. at 453 (citing United States v. Mullins, 22 F.3d 1365, 1373 (6th Cir.1994)). Based upon these standards, the trial court has broad discretion in deciding whether to admit evidence pursuant to Rule 404(b). *See* Talley, 164 F.3d at 999.

In this case, the Court finds that the district court did not abuse its discretion in admitting a 1991 review by HUD's monitoring division, the resulting action by HUD's mortgagee review board, LLFC's July 1991 response to the mortgagee review board, and the settlement agreement and letter of reprimand disposing of the administrative action. Viewing the evidence in the light most favorable to the prosecution, the evidence at issue was properly admitted to demonstrate Appellants' knowledge, motive, and intent. Although some prejudice may have arisen due to the admission of this evidence, the prejudice does not amount to the type of unfair prejudice contemplated by Rule 403. Based upon the foregoing, we find that the trial court acted within its broad discretion in admitting the evidence pursuant to Rule 404(b) and that Appellants' argument in this regard is without merit.

3. Admission of Income Evidence

Similarly, Appellants contend that the district court erred in permitting Appellee to inquire about the amount of their income from LLFC and related corporations. The evidence in question reflected a gross income of over $700,000 for each Appellant. Appellants argue that the admission of this income evidence was unfairly prejudicial, lacked any probative value of any element of the crime charged by the government, and was in violation of Rule 403.

In maximizing the probative value of this evidence and minimizing its prejudicial effect, we find that the income evidence was relevant to demonstrate that financial gain was the motive for the crimes charged. *See, e.g.*, Pointer v. United States, 151 U.S. 396, 414, 14 S.Ct. 410, 38 L.Ed. 208 (1894) (proof of motive always welcome). Stated another way, Appellants' substantial income was necessarily dependent upon GNMA's continuation of LLFC's loan commitment authority. In the event that GNMA became aware of the actual number of LLFC's loan delinquencies, the result would have had a profound financial effect on Appellants, LLFC's sole shareholders, in that they would cease to gain profits from the issuance of the mortgage-backed securities. In this way, the income evidence had a significant probative value because it demonstrated what Appellants stood to lose if they properly reported the actual loan delinquencies. For this reason, the trial court properly exercised its broad discretion in admitting this evidence.

C. Post-Trial Rulings

Next, Appellants challenge various post-trial rulings made in the court below. The first four of these challenges relate to the district court's decisions in fashioning appropriate sentences under the Guidelines. More specifically, Appellants challenge the district court's determination of the amount of loss attributable to them, its denial of a motion for downward departure made by Appellant Laws, its application of an obstruction of justice enhancement, and its computation of Appellant Laws's criminal history category. The final challenge involves the district court's ruling concerning an investigation into alleged jury misconduct at trial. Prior to addressing these particular issues, we briefly reiterate the district court's general determinations at sentencing.

At the sentencing hearing, the district court allowed testimony and other evidence concerning Appellants' objections to the presentence investigation reports. Upon conclusion of such evidence and argument related to the same, the district court sentenced each Appellant to a term of eighty-seven months of imprisonment, to be followed by a three-year term of supervised release. The court further ordered that Appellants make restitution to the victims in this case, namely HUD/FHA and GNMA, in the amount of one million dollars. Appellants now appeal their sentences to this Court.

1. Amount of Loss

Appellants first contend that the district court erred in calculating the amount of loss attributable to them at sentencing. The district court's definition of loss is a question of law to be

reviewed *de novo*. *See* United States v. Kohlbach, 38 F.3d 832, 841 (6th Cir.1994). We review the district court's factual findings with respect to loss under the clearly erroneous standard. *See* id. To the extent that one challenges the district court's calculation of loss, therefore, the appellant bears the heavy burden of persuading the reviewing court that "the evaluation of the loss was not only inaccurate, but was outside the realm of permissible computations." United States v. Jackson, 25 F.3d 327, 330 (6th Cir.1994).

In this case, the district court computed the amount of loss under § 2F1.1 of the Sentencing Guidelines. Section 2F1.1 of the Guidelines governs the calculation of loss for offenses involving fraud or deceit. That section begins by assigning a base offense level of six, and then increasing the base offense level by the amount of loss. In the instant case, the district court computed the amount of loss using three figures. First, the district court determined the amount of loss to HUD/FHA incurred due to the false claims convictions. Next, the district court inquired as to the amount of loss calculated in light of the conspiracy conviction. Last, the district court included the amount of loss incurred by GNMA. The district court added these three figures to arrive at a total loss of at least $9,271,400 for purposes of sentencing. Section 2F1.1(b) provides that if the loss was more than $5,000,000 but less than $10,000,000, then the district court shall increase the base offense level of six by fourteen levels, resulting in an offense level of twenty. U.S.S.G. § 2F1.1(a) and (b)(1)(O). Accordingly, the district court increased Appellants' offense levels to twenty. We now consider Appellants' argument that the district court's computation of loss and corresponding increase in the offense levels was in error.

a. Amount of Loss for False Claims Convictions

In examining the amount of actual or intended loss caused by Appellants' false claims, the district court first noted the presentence investigation reports' ("PSRs' ") calculation of $750,000 in actual or intended losses to HUD/FHA. J.A. at 384-85. The court adopted the PSRs' calculation in this regard, based in part on the undisputed fact that HUD/FHA paid a total of $709,876.42 in actual loss on 69 of the 74 false claims. J.A. at 385. With respect to three of the false claims upon which HUD/FHA denied payment, the district court found that because the average claim payment was approximately $10,000, those claims represented an additional $40,000 in intended losses to HUD/FHA. J.A. at 385 (citing United States v. Moored, 38 F.3d 1419, 1427 (6th Cir.1994) (" '[L]oss' under § 2F1.1 is not the potential loss, but is the actual loss to the victim, or the intended loss to the victim, whichever is greater.")) Adding the $709,876.42 in actual loss to $40,000 in intended loss, the district court arrived at $749,876.42 as the total amount of loss to HUD/FHA. J.A. at 385.

Appellants contest the computation of the false claims figure by arguing, *inter alia,* that it fails to include any set-offs for amounts collected on the defaulted loans, the inclusion of monies paid by LLFC in annualized amounts for each loan to cover losses, or the value of the note for each loan assigned to the government in exchange for payment of the claim. Such an argument, however, is insufficient to demonstrate that the evaluation of the loss fell outside the realm of permissible computations under the Guidelines. The commentary to § 2F1.1 provides:

> For the purposes of subsection (b)(1), the loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information. This estimate, for example, may be based on the approximate number of victims and an estimate of the average loss to each victim, or on more general factors, such as the nature and duration of the fraud and the revenues generated by similar operations....

Id. at cmt. n. 9. Furthermore, the commentary addresses the circumstances presented in fraudulent loan application cases and contract procurement cases in note 8(b), which states:

> In fraudulent loan application cases and contract procurement cases, the loss is the actual loss to the victim (or if the loss has not yet come about, the expected loss). For example, if a defendant fraudulently obtains a loan by misrepresenting the value of his assets, the loss is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered (or can expect to recover) from any assets pledged to secure the loan. However, where the intended loss is greater than the actual loss, the intended loss is to be used.

Id. at cmt n. 8. According to these passages, the district court was not required to make the precise determination of loss caused by Appellants, set- off by amounts recovered on the defaulted loans.

To the contrary, the application notes specifically delineate that in circumstances where the intended loss is greater than the actual loss incurred, the district court shall use the intended loss in calculating the proper offense level under the Guidelines.

The relevant case law also supports the use of intended loss under § 2F1.1, explaining that the figure is designed to assign responsibility for the harm that was meant to take place, regardless of whether the harm did, in fact, occur. *See* Moored, 38 F.3d at 1425. That is, so long as the intended loss is supported by a preponderance of the evidence, the district court may use it in reaching the appropriate offense level. *See* id. at 1427-28. In this instance, the district court found that there was evidence in the record sufficient to support a finding that Appellants caused a loss of $749,876.42 to HUD/FHA. J.A. at 385. Upon a review of § 2F1.1, its accompanying commentary, and the relevant case law as applied to the facts in the record in this case, we find that the court below properly calculated the amount of loss for false claims submitted to HUD/FHA.

b. Amount of Loss for Conspiracy Convictions

Moreover, because Appellants were found guilty of conspiracy to submit false claims, the district court found that § 1B1.3 of the Guidelines required that all false claims submitted by co-conspirators, even those claims not charged in the Indictment, be included within the relevant conduct for purposes of fashioning the appropriate sentence. At trial, Mr. Gibson testified that there were 335 additional claims submitted to HUD/FHA that contained materially false documents, in addition to those with which Appellants were charged. J.A. at 385, 2233-35. The amount

HUD/FHA paid on these additional false claims was $3,326,663.75. J.A. at 385. Based upon this testimony, the district court determined that the total loss for all false claims was $4,076,540.17.

Appellants contest the district court's findings with respect to the loss arising out of the conspiracy convictions. Generally, Appellants argue that the relevant conduct should not have included these additional false claims because the government failed to establish that these 335 loan files actually contained any materially false documents. Accordingly, Appellants ask this Court to reverse the district court's finding concerning the relevant conduct for purposes of sentencing.

Section 1B1.3(a)(1)(A) of the Guidelines explains that fraudulent claims that are submitted and paid, but not part of the counts of conviction, shall be included in the sentencing calculation as relevant conduct. This provision instructs that the offense level be determined based upon "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; ... that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." U,S.S.G. § 1B1.3(a)(1)(A). Here, Appellants were found guilty on the charge of conspiracy to defraud the United States. The additional false claims were identified at trial by Mr. Gibson. The record further reflects that, upon examination by HUD investigators, the files in question did contain false claims. As such, these claims constitute additional criminal wrongdoing, not specifically charged in the Indictment, that is properly taken into consideration when formulating the relevant conduct for sentencing. Based upon the information in the

record, we find Appellants' argument concerning the relevant conduct to be without merit.

c. Amount of Loss to GNMA

Finally, the trial court considered the amount of loss to GNMA which, without knowledge of LLFC's actual loan delinquency rates, extended additional loan pool commitment authority to LLFC. The district court explained that Appellants' misrepresentations resulted in an increased amount of loans and securities, of which 522 loans defaulted. J.A. at 387. The record reflects that these defaulted loans resulted in a loss of $5,194,860 to GNMA. J.A. at 387. Adding the loss incurred by GNMA to the loss incurred by HUD/FHA, the district court found that the PSRs correctly determined the amount of loss to be at least $9,271,400. J.A. at 388.

The general rule in determining loss requires the court to examine the causal connection between the criminal conduct and the alleged loss, and whether it was reasonably foreseeable to the defendants that the loss would occur. *Cf.* United States v. Krenning, 93 F.3d 1257, 1269 (5th Cir.1996) (stating that the amount of loss must bear a reasonable relation to the actual or intended harm of the offense). In this regard, the district court observed that:

> [LLFC] had a high delinquency rate in its loan portfolio due to the high number of falsifications in the documents, which falsifications were the direct result of defendants' knowing and willful actions. Loans were therefore made to individuals who were

> poor credit risks. The government has established by a preponderance of the evidence that [LLFC] manipulated the delinquency rate information in order to conceal its true delinquency rate from GNMA authorities. In other words, "but for" the criminal action by these defendants, the additional loans would not have been issued by [LLFC] and underwritten by GNMA. It was foreseeable to these defendants that a high number of loans would default because [LLFC] had been previously warned by GNMA that the default/delinquency rate was not currently at an acceptable level.

J.A. at 387-88 (footnote omitted). Upon a thorough review of the evidence presented at trial, in addition to the law and argument set forth by the parties on this issue, we find that the district court properly concluded that it was reasonably foreseeable that the loss in question would be incurred by GNMA as a direct result of Appellants' conduct. For this reason, we affirm the district court's ruling that the loss incurred by GNMA was in the amount of $5,194,860. Furthermore, the district court correctly added this loss to that incurred by HUD/FHA, finding that the total loss was at least $9,271,400.

Based upon our determination that the district court made proper findings concerning: (1) the amount of loss to HUD/FHA incurred due to the false claims convictions; (2) the amount of loss under the relevant conduct figure calculated in light of the conspiracy convictions; and (3) the amount of loss incurred by GNMA, we conclude that the district court properly applied §

2F1.1(b), which required it to increase Appellants' base offense level of six by fourteen levels, resulting in a level twenty. U.S.S.G. § 2F1.1(a) and (b)(1)(O). As such, we find Appellants' argument concerning the district court's computation of loss and corresponding increase in the offense level to be without merit. The district court's computation of loss in this case is, therefore, affirmed.

2. Downward Departure

Next, we consider Appellant Laws' argument that the district court improperly refused to depart downward from its sentencing computation under the Guidelines. The record reflects that counsel for Appellant Laws filed a written motion in the district court just one day prior to the sentencing hearing, in which he requested a downward departure from the Guidelines pursuant to § 5K2.0. J.A. at 391-92. While recognizing its authority to make such a departure, the district court, nevertheless, found that the grounds set forth in the motion and supporting memorandum did not warrant the requested departure. J.A. at 392. On this basis, the district court denied the motion. J.A. at 392. Appellant Laws now objects to the district court's failure to grant him a downward departure pursuant to § 5K2.0 of the Guidelines.

Section 5K2.0 states, in pertinent part:

> the sentencing court may impose a sentence outside the range established by the applicable guidelines, if the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into

> consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.

U.S.S.G. § 5K2.0 (internal quotations omitted). Appellant Laws argues that he was entitled to a departure pursuant to this provision because there are at least two features of his conduct that take this case outside of the heartland of comparable fraud cases. First, Appellant Laws argues that he lacked the intent to steal money from the United States. Second, he argues that the VOE and VOD forms were not even necessary, as the loan files already contained adequate verification of employment and adequate verification of deposit upon which HUD/FHA could and would have relied to pay the majority of the claims. As to the latter argument, Appellant Laws states that while he was found by a jury to have technically violated the law, his intention was not to defraud the government but rather to ensure prompt payment on the claims to which it was rightfully entitled payment.

The refusal of a district judge to make a downward departure is not ordinarily appealable. *See* United States v. Byrd, 53 F.3d 144, 145 (6th Cir.1995). In United States v. Davis, 919 F.2d 1181, 1187 (6th Cir.1990), we held:

> Where, as here, the guideline range was properly computed, the district court was not unaware of its discretion to depart from the guideline range, and the sentence was not imposed in violation of law or as a result of an incorrect application of the guidelines, the failure to depart is not cognizable on appeal under 18 U.S.C. § 3742(a).

In the instant case, Appellant Laws does not make any effort to avoid this rule, which prevents him from making the argument concerning the downward departure in this Court. Furthermore, the district judge went beyond this Circuit's requirements in ruling on the motion, by stating affirmatively that he was aware that he possessed the power to make a downward departure but declined to do so. *Cf.* Byrd, 53 F.3d at 145 (explaining that the trial judge does not have a duty to state affirmatively that he knows that he possesses the power to make a downward departure, but declines to do so). For these reasons, we affirm the district court's ruling.

3. Obstruction of Justice Enhancement

We now turn to Appellants' argument that the district court erred when it enhanced their sentences for obstruction of justice. Section 3C1.1 of the Guidelines states that:

> If ... the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense, ... increase the offense level by 2 levels.

U.S.S.G. § 3C1.1. One type of obstructive conduct specifically mentioned in the Guidelines is perjury. *See id.* at cmt. n. 4(b). We employ a clearly erroneous standard in reviewing a district court's factual determination that a defendant's conduct warrants an obstruction of justice enhancement. *See* United States v. Walker, 119 F.3d 403, 405 (6th Cir.1997).

In the instant case, the court below determined that Appellants falsely testified under oath about a material matter when they denied any knowledge concerning the admission of false and fraudulent claims. J.A. at 389. In particular, in a memorandum and order issued on October 7, 1999, *nunc pro tunc* August 6, 1999, the district court pointed to the following testimony made by Appellant Logan:

> Q. ... Mr. Logan, at any time, at any time, did you ever direct any employee of [LLFC] to make any false entries in any claims?
> A. No, sir, never.
>
> * * *
>
> Q. What about Mr. Jim Gibson? What knowledge did you have before your business was closed that he was submitting any false insurance claims to HUD or FHA?
> A. I had no knowledge of him doing that.

J.A. at 389 (citing Doc. 360, attachment, pp. 27-28). The district then turned to the following testimony made by Appellant Laws:

> Q. ... Did you or not ever [sic] knowingly or willfully make or cause anyone else to make any false claims to HUD?
> A. No, I didn't.
>
> * * *
>
> Q. Did she [Iva Jean Lewis] ever indicate to you that she was forging any documents?

A. No, she didn't not--

Q. Did she ever indicate to you she needed to forge any documents to get the claims filed?

A. No, she did not.

* * *

Q. Did you ever tell anybody to falsify any documents?

A. I never told Jim Gibson or Iva Lewis or anybody else in our office to falsify any documents whatsoever.

J.A. at 389-90. Contrary to this testimony made by Appellants, however, the district court noted that, at trial, witnesses Gibson and Lewis swore under oath that Appellants Logan and Laws directed them to falsify documents for the submission of loan insurance claims. J.A. at 390.

In addition, the district court stated the following with respect to the evidence in the form of testimony made by various LLFC employees:

> Ms. Lewis pointed to specific entries in her contemporaneous notes in which she detailed Mr. Laws' directions to [falsify documents]. Likewise, Jacquelyn Matheson testified that she was directed by Mr. Laws to complete missing forms for use in FHA claims. Similarly, Leisa Tadlock Campbell testified that she and other employees were personally directed by ... defendants [Logan and Laws] to falsify documents for use in FHA loan insurance claims. Finally, Sarah Mays, a

> co-defendant, testified that it was common knowledge throughout [LLFC] that Mr. Gibson was using false documents in FHA claims and that she too had been asked to create false documents.

J.A. at 390-91. Considering the record as a whole, the district court found that, based upon its own assessment of the evidence presented at trial, Appellants committed perjury by giving untruthful testimony on material matters designed to substantially affect the outcome of the case. J.A. at 391. Thus, the district court applied the two-level enhancement to Appellants' Guideline calculation. J.A. at 391. In doing so, the district court was careful to note that it made the finding of obstruction of justice independent of the jury's verdict of guilty. *Id.* Therefore, the district court made its own independent determination that Appellants engaged in obstructive conduct which warranted an application of the enhancement.

Appellants' main argument on appeal is that the district court's memorandum and order making the findings required by § 3C1.1 is without effect because it was issued after Appellants filed a timely notice of appeal and was not timely served on Appellants' counsel. Even assuming that Appellants' position properly reflects the relevant procedural history, we find any error by the district court committed in this regard to be harmless in nature. The information upon which the district court ultimately based its decision to apply the two-level enhancement is clearly set forth in the PSRs, which state:

> The [defendants rely] on U.S. v. Spears, 49 F.3d 1136 (6th Cir.1995), in stating that the adjustment for obstruction of justice is inappropriate when the defendant testifies and the court relies on the jury's verdict of guilt in applying the enhancement. This is true to the extent that the court cannot rely simply on the verdict of guilt to support the enhancement. The court must make findings of specific instances of the defendant's testimony, which was directly contradicted by the testimony of other witnesses. The United States has a transcript of various witnesses at the trial, listing specific examples for the court of direct contradictions to the [defendants'] perjured testimony. This transcript will be provided at the sentencing hearing for the court's use in determining specific examples of perjured testimony. Once this testimony is identified, the enhancement meets the standard set forth in Spears.

In the presentence report, the [defendants'] perjured testimony has been used as the basis of the obstruction of justice enhancement. While the probation officer feels that this alone is sufficient to warrant the two-level increase, it should also be noted that the [defendants] ... transferred over 1.5 million dollars in assets from [LLFC] to John H. Laws, defendant Alan Michael Laws' father, and Elizabeth Logan, wife of co-defendant John Logan. These transactions occurred after the FBI search and seizure of records from [LLFC], and the defendants were aware

they were under investigation for the instant offense. Details of these transactions are outlined in the financial section of the presentence report. The transfer of these assets represent[s] an obstruction of justice, in that it impedes the administration in the collection of restitution. The enhancement for the transfer of assets is supported by U.S. v. Black, 78 F.3d 1 (1st Cir.1996). J.A. at 2319, 2381. Appellants' argument on appeal is tantamount to an assertion of lack of notice with respect to the district court's findings in support of the obstruction of justice enhancement. We find this argument to be without merit for several reasons.

At sentencing, the district court adopted the factual findings as suggested by the probation officer in the PSRs and thereby made Appellants aware of the basis for its application of the two-level enhancement, overruling Appellants' objections on the record to the same. Furthermore, the record at the time of sentencing was replete with examples of the obstructive conduct, including a detailed explanation of the perjury and the transfer of assets outlined in a brief submitted by the government. J.A. at 2405-13. At the time of sentencing, the district court had before it the information in the PSRs, the government's brief, and its own observations of the trial made independent of the jury's verdict of guilty. Based upon this record, the district court found that the enhancement was proper. Moreover, the district court issued the above outlined memorandum and order specifically addressing the findings that gave rise to its application of the enhancement. Although the memorandum and order would have been more properly issued prior to Appellants' filing the notice of appeal, Appellants were adequately aware of the particular basis upon which the trial judge made his decision.

Here, the Court is not faced with a situation in which the trial court altered the sentence or otherwise materially changed the record after the notice of appeal had been filed. Rather, in this case, the district judge merely supplemented the existing record with findings that were consistent with his previous rulings. The district court did not alter the punishment to the benefit or detriment of Appellants, nor did it alter any aspect of the case involved in the appeal. The memorandum and order served only to expand more fully upon the findings that had already been made in open court. Even if we were to find that the filing of the notice of appeal divested the district court of jurisdiction to issue the supplemental statement of reasons, being fully informed of the allegations leading to the court's determination that they obstructed justice, any error on the part of the district court in this regard was harmless and, thus, does not warrant reversal.

4. Criminal History Computation

We now consider the argument that the district court incorrectly calculated Appellant Laws's criminal history category under the Guidelines. More specifically, Appellant Laws states that the district court incorrectly assessed one criminal history point for a driving-under-the-influence ("DUI") conviction that took place on April 7, 1987. Appellant Laws argues that because he was not represented by counsel on this misdemeanor charge, and the conviction resulted in a sentence of imprisonment, it should not have been included in his criminal history computation.

In support of this position, Appellant Laws relies principally upon Nichols v. United States, 511 U.S. 738, 114 S.Ct. 1921, 128 L.Ed.2d 745 (1994). He argues that Nichols indicates

that a sentencing court may consider a defendant's previous uncounseled misdemeanor conviction for DUI only if the previous uncounseled misdemeanor did not result in a sentence of imprisonment. Because a sentence of imprisonment was imposed with respect to his 1987 conviction, Appellant Laws asserts that this offense should not be included in calculating his criminal history category. We find Laws's use of Nichols here to be misplaced.

The Nichols' case established the rule that uncounseled misdemeanor convictions are properly included when determining a defendant's criminal history category only if the convictions did not result in sentences of imprisonment. Id. at 746-47, 114 S.Ct. 1921. Despite Appellant Laws's arguments to the contrary, however, the rule in Nichols is inapplicable to the instant case. The record reflects that Appellant Laws knowingly and intelligently waived his right to counsel in connection with the 1987 DUI conviction and, thus, it did not constitute an "uncounseled" misdemeanor conviction as addressed in Nichols. Furthermore, the fact that Appellant Laws was sentenced to a term of imprisonment in connection with this conviction alone does not preclude the district court from including the offense in the criminal history computation. The knowing and intelligent waiver of the Sixth Amendment privilege reflects that the district court properly assessed one criminal history point for the 1987 DUI conviction pursuant to § 4A1.1(c) of the Guidelines. For these reasons, we find that the district court did not err in computing Appellant Laws's criminal history category.

5. Investigation of Alleged Jury Misconduct

Finally, Appellants contend that the district court erred in denying a motion filed by Appellant Laws for permission to communicate with jurors. In the motion, Appellant Laws stated that "after the jurors in this case were released from further jury service, counsel for Mr. Laws ... had a communication with a juror in this case, but did not feel that further communication should be had without permission of the Court." J.A. at 367. Out of a purported abundance of caution, therefore, Appellant Laws requested permission to interrogate the jurors. J.A. at 367.

In considering the motion filed by Appellant Laws, the district court first recognized the existence of Local Rule 48.1 for the Eastern District of Tennessee, which governs post-verdict communications with jurors. J.A. at 367. It provides that:

> No attorney, party, or representative of either may interrogate a juror after a verdict has been returned or the trial has been otherwise concluded, without prior permission of the court.

J.A. at 367 (quoting L.R. 48.1 (E.D.Tenn.)). The district court also acknowledged that Rule 606(b) further circumscribes the practice of post- verdict inquiries, by stating that jurors may testify only as to whether extraneous prejudicial information was improperly brought to their attention or whether any outside influence was improperly brought to bear upon any juror. J.A. at 370. In light of these standards, and in addition to the relevant case law, the district court made the following determination:

> In the instant case, [Appellant] Laws did not allege any juror misconduct during the trial, and

> does not allege any now. The defendant's motion and supporting brief provide no grounds upon which post-verdict interrogation should be granted, except to note that only by communicating with the jurors could defendant's counsel discover if there had been any external influences on jurors. The same is true of every case, however, and granting defendant's motion on these grounds alone would potentially open up any jury verdict to impeachment.

J.A. at 370-71. Finding that a grant of the motion would give rise to an improper fishing expedition through which Appellant sought to undermine the integrity of the jury verdict, the district court denied the request for permission to interrogate the jurors. J.A. at 371.

In response to the district court's ruling, Appellant Laws filed a motion to alter or amend the court's order denying permission to interview the jurors. J.A. at 372. In this second motion, counsel for Appellant Laws explained that during his communication with a juror, he learned that the jury routinely discussed evidence among themselves during the course of the entire trial, thereby effectively deliberating prior to the close of the evidence and prior to being advised of the appropriate jury instructions. J.A. at 373. Based upon this allegation of jury misconduct, Appellant Laws argued that he should be permitted to investigate the situation, which may have given rise to a violation of his Sixth and Fifth Amendment rights to a fair trial and an impartial jury under the Constitution. J.A. at 373. Furthermore,

counsel for Appellant Laws, Robert W. Ritchie, attached his sworn affidavit in support of the motion.

Thereafter, Appellant Logan filed a "motion to adopt defendant Law's [sic] pending motion to alter or amend [the] July 14, 1999 order denying permission to interview jurors." On July 19, 1999, the district judge denied Appellants' motion to alter or amend its prior ruling in a marginal entry order. Appellants now raise this issue concerning the alleged jury misconduct before this Court.

It is a well-established principle of law that trial judges are afforded considerable discretion in determining the amount of inquiry necessary, if any, in response to allegations of jury misconduct. *See* United States v. Griffith, 17 F.3d 865, 880 (6th Cir.1994); United States v. Franks, 511 F.2d 25 (6th Cir.1975). We have thus recognized that because "the trial judge is in the best position to determine the nature and extent of the alleged jury misconduct, his decision on the scope of the proceedings necessary to discover misconduct is reviewed only for an abuse of discretion." *See* Griffith, 17 F.3d at 880 (quoting United States v. Shackelford, 777 F.2d 1141, 1145 (6th Cir.1985)). In cases involving a post- verdict investigation into alleged jury misconduct, the relevant federal law concerning the impeachment of jury verdicts is codified in Rule 606(b).

Rule 606(b) provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as

> influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Fed.R.Evid. 606(b). Accordingly, the Rule is designed to prohibit testimony on matters that take place during deliberations, the effect of anything on the juror's minds or emotions, and the mental process of any juror. As provided in the language of the Rule, exceptions are made only with respect to extraneous prejudicial information improperly brought to the jury's attention and evidence concerning an outside influence brought to bear upon any juror. In Tanner v. United States, 483 U.S. 107, 116-34, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987), the Supreme Court provided a detailed examination of Rule 606(b) in upholding the lower court's exclusion of evidence offered by two jurors regarding the other jurors' alleged use of drugs and alcohol during the course of the trial. In reaching the conclusion that the influence at issue was internal in nature, rather than external in nature, and consequently not properly a subject for questioning of the jurors pursuant to Rule 606(b), the Supreme Court explained that public policy considerations have long emphasized the necessity of shielding

jury deliberations from public scrutiny. Id. at 119, 107 S.Ct. 2739. In this regard, the Supreme Court referred to the 1915 decision of McDonald v. Pless, 238 U.S. 264, 267-68, 35 S.Ct. 783, 59 L.Ed. 1300, which stated:

> [L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation--to the destruction of all frankness and freedom of discussion and conference.

Id. at 119-20, 107 S.Ct. 2739 (citing Mattox v. United States, 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917 (1892)). Thus, the Supreme Court recognized the various public policy considerations that weigh in favor of protecting a jury's deliberations from intrusive inquiry as to internal influences. Id. at 127.

Based upon the foregoing, it is clear that the very purpose behind Rule 606(b) is to preserve one of the most basic and critical precepts of the American justice system: the integrity of the jury. *See* id. Rule 606(b) allows for a system in which jurors may

engage in deliberations with the utmost candor, performing in an uninhibited way the fact-finding duties with which they are charged. *See* id. In this manner, the Rule provides jurors with an inherent right to be free from interrogation concerning internal influences on the decision-making process. *See* id. Such internal influences have been held to include pressure of one juror on another, *see* Smith v. Brewer, 444 F.Supp. 482 (S.D.Iowa 1978); juror misunderstanding of court instructions, *see* United States v. D'Angelo, 598 F.2d 1002 (5th Cir.1979); a verdict achieved through compromise, *see* United States v. Campbell, 684 F.2d 141 (D.C.Cir.1982); juror misgivings about the verdict, *see* United States v. Barber, 668 F.2d 778 (4th Cir.1982); and juror agreement on a time limit for a decision, United States v. Badolato, 710 F.2d 1509 (11th Cir.1983). Accordingly, Rule 606(b) prevents the unwarranted badgering of jurors that would invariably arise in its absence in an alleged attempt to search for the "truth" as to the manner in which each and every jury reaches a verdict. *See* Tanner, 483 U.S. at 119-27, 107 S.Ct. 2739.

Moreover, Rule 606(b) does not exist in a vacuum. *See* id. at 127, 107 S.Ct. 2739. To the contrary, the Rule exists as just one portion of the overall justice system, which is likewise designed to protect the constitutional rights of the defendant, including the defendant's Sixth and Fifth Amendment rights to a fair trial and an impartial jury under the Constitution. *See* id. In this regard, the Supreme Court has stated, for example:

> Petitioners' Sixth Amendment interests in an unimpaired jury ... are protected by several aspects of the trial process. The suitability of an individual for the responsibility of jury service, of course, is examined during *voir dire*. Moreover,

> during the trial the jury is observable by the court, by counsel, and by court personnel. Moreover, jurors are observable by each other, and may report inappropriate juror behavior to the court *before* they render a verdict. Finally, after the trial a party may seek to impeach the verdict by nonjuror evidence of misconduct.

Id. (emphasis in original) (internal citations omitted). Thus, there exist various sources of protection built into the legal system which protect the defendant's constitutional rights throughout the trial process. *See* id. Hence, the entire process, including Rule 606(b), is designed to balance the integrity of the jury system against the rights of the defendant. *See* id.

Against this backdrop, a court facing post-verdict allegations of jury misconduct shall rely on the essence of Rule 606(b), which provides that if the case involves an extraneous or external influence on the jury, then a post- verdict interrogation of jurors is permitted in order to adequately protect the defendant's constitutional rights. *See* id. Conversely, if the case involves an internal influence, the Rule does not permit the post-verdict interrogation of jurors. In the latter instance, the preservation of the integrity of the jury system outweighs any potential violation of the defendant's constitutional rights. *See* id. In this way, the internal influence versus external influence distinction in the Rule is designed to balance the preservation of the integrity of the jury system and the rights of the defendant.[FN2] *See* id.

FN2. *But see* Doan v. Brigano, 237 F.3d 722, 722 (6th Cir.2001). In that case, a panel of this Court framed the issue in

terms of whether an application of Rule 606(b) violated the defendant's constitutional rights, as opposed to relying on the internal versus external influence distinction built into the Rule to preserve the integrity of the jury as well as the rights of the defendant.

In the instant case, the alleged jury misconduct consisted of potentially premature deliberations that occurred during the course of the trial. The district court correctly determined that this alleged misconduct constituted a potential internal influence on the jury. Because Rule 606(b) prohibits post-verdict interrogation of jurors as to internal influences, the district court did not err in denying Appellants' motion for permission to interview the jurors. Accordingly, we shall not reverse the lower court on this basis.

III. CONCLUSION

For the reasons stated herein, we AFFIRM the judgment reached and the sentences imposed in the court below. More specifically, we hold that the district court did not err in finding that the search warrant executed by the government of LLFC's premises was not a general warrant in violation of the Fourth Amendment. In addition, the district court properly held that there was sufficient evidence to find Appellants guilty of making false claims, false entries or false statements, and conspiracy. Furthermore, the district court did not err in admitting evidence of a settlement agreement between HUD/FHA and LLFC and evidence of Appellants' reported taxable income. As to sentencing, we find that the district court did not err in calculating loss, in refusing to depart downward

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from Appellant Laws's sentencing computation, in enhancing Appellants' sentences for obstruction of justice, and in calculating Appellant Laws's criminal history category. Finally, we hold that the district court did not err in refusing to allow counsel for Appellants to conduct a post-verdict interrogation of jurors concerning alleged jury misconduct that took place during the trial.

App. 60

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
GREENEVILLE

FILED

AUG 4 1:57 PM'93

U.S. DISTRICT COURT
EASTERN DIST. TENN

BY CL, DEP. CLERK

IN THE MATTER OF THE SEARCH)
OF THE LOGAN-LAWS FINANCIAL)
CORPORATION, 500 PRINCETON)
ROAD, JOHNSON CITY,)
TENNESSEE AND ANY AND ALL)
OUTBUILDINGS, APPURTENANCES)
STORAGE AREAS AND UNITS)
ASSOCIATED THEREWITH. THE)
LOGAN-LAWS FINANCIAL)
CORPORATION IS REACHED FROM)
NORTH ROAN STREET BY)
TURNING EAST ON PRINCETON)
ROAD AND TRAVELLING)
APPROXIMATELY .8 MILES TO A)
SINGLE STORY OFFICE BUILDING)
CONSTRUCTED OF LIGHT BROWN)
BRICK, ALUMINUM SIDING AND)
STUCCO AT THE INTERSECTION)

SEARCH WARRANT

No. Misc-2-93-21

OF PRINCETON ROAD AND)
SILVERDALE DRIVE. THE)
BUILDING HAS STORAGE AREAS)
ABOVE THE FIRST FLOOR)
WORKSPACE AND THE FRONT)
OF THE BUILDING HAS A RED)
AWNING TRIMMED IN WHITE AND)
A WHITE MAILBOX LABELED 500)
WITH BLACK NUMBERS.)

TO: Any Authorized Officer of the United States.

Affidavit having been made before me by Derek B. Johnson, Special Agent, Federal Bureau of Investigation, who has reason to believe that on the premises of the business of LOGAN-LAWS FINANCIAL CORPORATION, located at 500 Princeton Road, Johnson City, Tennessee, and any and all outbuildings, appurtenances, storage areas and units associated therewith, in the Eastern District of Tennessee, there is now concealed certain property, namely:

1) Information and/or data stored in the form of magnetic or electronic coding on computer media or in media capable of being read by a computer or with the aid of computer related equipment. This media includes but is not limited to floppy diskettes, fixed hard disks, removable hard disk cartridges, tapes, laser disks, video cassettes, and any other media which is capable of storing magnetic coding.

2) Electronic devices which are capable of analyzing, creating, displaying, converting, or transmitting electronic or magnetic computer impulses or data. These devices include but are not limited to computers, computer components, computer peripherals, word processing equipment, modems, monitors, printers, plotters, encryption circuit boards, optical scanners, external hard drives and other computer related electronic devices.

3) Instructions or programs in the form of electronic or magnetic media which are capable of being interpreted by a computer or related components. The items to be seized could include but would not be limited to operating systems, application software, utility programs, compilers, interpreters, and any other programs peripherals either directly or indirectly via telephone lines, radio, or other means of transmission.

4) Printed material which provide instructions or examples concerning the operation of a computer system, computer software, and/or any related device.

5) Telephone long distance call records and records of wire and electronic interstate communications.

6) Records, files, documents, notes, correspondence, microfiche, or computerized entries concerning the Department of Housing and Urban Development (HUD), Government National Mortgage Association (GNMA), Federal Housing Administration (FHA), manufactured home dealers, borrowers both past and present, payment history and current loan status of

borrowers, loan files and accounts of borrowers, loan applications, and copies of submissions to FHA, GNMA, HUD, FHA insurance claims and claims records.

7) Accounts receivable and records thereof.

8) Retained copies of documents relating to banking transactions, including but not limited to:

(1) retained copies of signature cards;
(2) bank statements;
(3) canceled checks;
(4) deposit tickets;
(5) retained copies of items deposited;
(6) retained copies of credit and debit memos.

9) Bank correspondence files.

10) Documents in books of original entry containing entries reflecting any and all transactions, including but not limited to General ledgers, General journals, Subsidiary ledgers, including but not limited to loan loss account ledgers, trial balances, Summary journals including but not limited to cash receipts and cash disbursements, Daily posting records and slips, check request forms, "special handling accounts" and "special handling account" reports.

11) Internal documents or instructions to employees, representatives or agents concerning GNMA, FHA, borrowers or manufactured homes dealers, personal and informal files, notes,

diaries, telephone call logs and telephone records, calendars and working papers of employees and officers of Logan-Laws, Articles of incorporation, or Partnerships.

12) All of the above listed documents may be found in written or electronic form.

All of these items are evidence of or have been used as the means of committing violations of Title 18, United States Code, Section 286, 287, 1001, 1010, 1012, 1341, 1343, and 1956 (a)(1)(A)(I), and constitute evidence of the commission of the above criminal offenses, and are currently being used by Logan-Laws Financial Corporation and others in violation of Title 18, United States Code, Section 286, conspiracy to defraud the United States with respect to claims; Section 287, presenting false claims to a department or agency of the United States; Section 1001; making false statements as to material facts concerning matters within the jurisdiction of a department of the United States; Section1010, making or passing false statements or documents to influence the Department of Housing and urban Development; Section 1012, making false reports to the Department of Housing and Urban Development; Section 1341, devising or engaging in a scheme or artifice to defraud involving the U.S. mails; Section 1343; devising or engaging in a scheme or artifice to defraud involving wire communications in interstate commerce; and Section 1956(a)(1)(A)(I), engaging in financial transactions involving the proceeds of specified unlawful activity with the intent to facilitate the carrying on of the specified unlawful activity, as the facts in the accompanying affidavit, herein incorporated by reference, establish.

I am satisfied that the affidavit and any recorded testimony establishes probable cause to believe that the property so described is now concealed on the person or premises above-described and establish grounds for the issuance of this warrant.

YOU ARE HEREBY COMMANDED to search within 10 days of issuance the person or place named above for the person or property specified, serving this warrant and making the search in the daytime – 6:00 a.m. to 10:00 p.m., and if the person or property be found there to seize same, leaving a copy of this warrant and receipt for the person or property taken, and prepare a written inventory of the person or property seized and promptly return this warrant to Thomas G. Hull, United States District Judge, as required by law.

July 21, 1993 At Greeneville, Tennessee

Date and Time Issued City and State

THOMAS G. HULL

UNITED STATES DISTRICT JUDGE /S/

Name/Title of Judicial Officer Signature – Judicial Officer

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

UNITED STATES OF AMERICA	) "STAMPED FILED"
	) JUN 30 5:38 PM '97
	) U.S. DISTRICT COURT
v.	)
	) No. 2:96-CR-17
JOHN M. LOGAN,	)
ALAN MICHAEL LAWS,	)
RAMON SANCHES-VINAS,	)
SARAH M. MAYS,	)
ROBERT L. LOGAN, and	)
TRACY W. FLEENOR,	)
	)
Defendants.	)

MEMORANDUM OPINION

This matter is presently before the court on defendants' timely objections [Doc. No. 171] and [Doc. 172][1] to the Report

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[1]Defendant Robert L. Logan failed to object to the Report and Recommendation of Judge Inman, and therefore waived any such objections pursuant to 28 U.S.C. § 636(b)(1)(B) and (C). *See United States v. Walters, 638 F.2d 947-950 (6th Cir. 1981); Thomas v. Arn, 474 U.S. 140 (1985).*
Defendant Tracy W. Fleenor purports to join in the objections of defendants John M. Logan and Alan Michael Laws [Doc. No. 173]. However, Judge Inman concluded in his R&R that only defendants Logan and Laws had standing to contest the legitimacy of the search, and that defendant Fleenor had no standing

and Recommendation ("R&R") [Doc. No. 170] filed by the Honorable Dennis H. Inman, United States Magistrate Judge, on March 14, 1997. In that R&R, Judge Inman recommended the denial of the motions to suppress made by defendants John Logan [Doc. No. 112], Tracy Fleenor [Doc. No. 140], Robert Logan [Doc. No. 109], and Alan Laws [Doc. No. 106] regarding all evidence seized as a result of the search of Logan-Laws Financial Corporation's premises located in Johnson City, Tennessee, on July 26, 1996 [sic]. As required by statute, *see* 28 U.S.C. § 636(b)(1), the court has not made a *de novo* determination of those portions of the R&R to which the defendants have objected. For the reasons that follow, the R&R will be accepted in whole and defendants' motion to suppress will be DENIED.

I. FACTS

On July 21, 1996, [sic] United States District Judge Thomas G. Hull issued a search warrant for the premises of Logan-Laws Financial Corporation ("Logan-Laws"). Logan-Laws is a Tennessee corporation located in Johnson City, Tennessee. The warrant authorized agents of the government to search for and seize any records, files, and documents relating to mobile home loans made by the corporation, which were issued by the Federal Housing Administration ("FHA") and the

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to object to any seizure of evidence excepting that of her own personal office in the corporations building. Consequently, as neither Logan nor Laws objected to the issue of standing, Fleenor also waived any objections she may have had to the R&R, except those concerning any items seized from her personal office. 28 U.S.C. § 636(b)(1)(B) and (C). *See Walters*, 638 F.2d at 947-50; *Thomas, 474 U.S. at 140.*

Government National Mortgage Association ("GNMA"). The warrant also included documents stored or maintained by means of computer.

The affidavit filed in support of the application for the warrant recited that (1) Logan-Laws was a mobile home financing company in Johnson City; (2) its entire business consisted of making loans to mobile home buyers, which were insured against losses (to Logan-Laws) under Title I of the FHA; (3) these insured loans were sold by the corporation through the mortgage backed securities program of GNMA; (4) Logan-Laws continued to service these loans after their sale; (5) GNMA requires a lender such as Logan-Laws to maintain a specific ratio of current loans to delinquent loans, reserving the right to cancel the lender's authorization to underwrite loans in the program if a lender exceeds the allowable percentage; (6) Logan-Laws regularly falsified loan documents filed with the FHA in support of the corporation's claims on defaulted loans; (7) Logan-Laws fraudulently manipulated its records by posting payments to delinquent accounts, in order to create the impression that its current-to-delinquent loan ratio was within the parameters required by GNMA; (8) communication of these fraudulent transactions occurred via interstate phone lines and United States Mail; and (8) [sic] records of these transactions could be found in the offices of named employees, in computer files, and among other records in a storage area.

The warrant issued by the district judge authorized the officers to search Logan-Laws' premises for the following evidence: information stored in electronic or magnetic form (i.e.,

computer stored); the computer hardware itself; any computer programs or operating systems; any printed instructions for operating the computer systems and its software; long distance telephone records and records of wire and electronic interstate communication; any records, files, documents, . . . or computerized entries regarding the Department of Housing and Urban Development ("HUD"), GNMA, FHA, manufactured home dealers, past and present borrowers of the corporation, loan histories, loan files and accounts of borrowers, loan applications, and copies of loan insurance claims submitted to FHA, GNMA, and HUD; accounts receivable and records thereof; various banking records (signature cards, statements, deposit tickets, etc.); bank correspondence file; and various account books including those concerning "special handling accounts" (those involving payments made to borrowers' accounts by Logan-Laws in order to manipulate the current-to-delinquent loan ratio). The warrant further indicated that all of the documents "may be found in written or electronic form."

The warrant was executed on July 26, 1996, [sic] at Logan-Laws' offices in Johnson City. According to the government's response to the motion to suppress, the documents seized were individual loan files; "special handling" reports and documents that were used to track payments paid to accounts of delinquent borrowers; binders which contained records of false claims made to the FHA; bank records and other documents showing that payments were made to the accounts of borrowers; correspondence to FHA and GNMA that contained false representations; internal memoranda concerning discussion of these "special handling accounts"; and an optical disk (i.e., a

computer disk) that contained a backup of the corporation's file server.

Subsequently, the defendants filed a motion to suppress the evidence seized in the search. Defendants claim that the warrant was so broad as to constitute a "general" warrant, which gave the executive officers unlimited discretion to search and seize anything on the premises in an effort to ferret out evidence of some crime. Alternatively, defendants argue that the descriptions of the items to be seized were so overly broad as to encompass virtually all of the corporation's business records, thereby commanding the executing officers to seize all such documents, including those not arguably connected to any alleged crime. Defendants also claim that the warrant was so "facially deficient" that the executing officers could not have presumed it to be valid. Further, the defendants assert that, notwithstanding the objections to the warrant itself, the optical disk, containing a backup of the corporation's entire computer system, was beyond the scope of the warrant and should therefore be suppressed.[2]

II. PROBABLE CAUSE

The Fourth Amendment to the United States Constitution decrees that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." A warrant lacking in particularity as to

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[2]As neither the government nor the defendants objected to the Judge Inman's conclusions of standing, this court will not address that issue.

the areas to be searched and the items to be seized "create[s] a danger of unlimited discretion in the executing officer's determination of what is subject to seizure and a danger that items will be seized when the warrant refers to other items." *United States v. Savoca,* 761 F.2d 292, 298-99 (6th Cir. 1985). Thus, if a warrant authorizes a "general, exploratory rummaging in a person's belongings," it is unconstitutional. *Coolide v. New Hampshire*, 403 U.S. 443,467,91 S Ct. 2022, 2038, 29 L.Ed.2d (1971).

The degree of particularity as to items to be seized, however, varies with the crime involved and types of items sought. *United States v. Henson*, 848 F.2d 1374, 1383 (6th Cir. 1988). *See also United States v. Blakeny,* 942 F.2d 101, 1026-27 (6th Cir.1991.) "Thus a description is valid if it is as specific as the circumstances and the nature of the activity under investigation permit. " *Henson,* 848 F.2d at 1383 (quoting *United States v. Blum,* 753 F.2d 999, 1001 (11th Cir. 1985).

In *Henson*, the Sixth Circuit upheld the validity of a search warrant calling for the seizure of a multitude of documentation, including records, computers, and electronic media, in a case involving conspiracy to commit mail fraud through the fabrication of mileage statements on used vehicles. In upholding the warrant, the court reasoned that the officer " could not have known at the time he applied for the warrant that precise record or files would contain information concerning the [criminal] scheme. "*Henson*, 848 F2d at 1383. Further, the court held that "[b]ecause the warrant...was "inclusive," it did not leave room for the officers to exercise unlimited discretion,' and

the evidence seized pursuant to the warrant should not be admitted, as there was probable cause to support a search of such *breadth. Id. See also United States v. Savoca,* 761 F.2d 292, 299 (6th Cir.1985) (where the discretion is not in the hands of the executing officer "the actual issue is whether there was probable cause to support a search of this breadth, not whether the warrant was general."), *cited with approval in Henson,* 848 F.2d at 1383.

The case at hand is markedly similar to *Henson* in that both involved broad search warrants that attempted to uncover specific evidence of convoluted fraudulent activity, buried amidst mounds of paperwork and computer documentation. Here, the warrant signed by the district judge, authorized, *inter alia,* the seizure of:

> [r]ecords, files, documents, notes, correspondence, microfiche, or computerized entries concerning [HUD], [GNMA], [FHA], manufactured home dealers, borrowers both past and present, payment history and current loan status of borrowers, loan files and accounts of borrowers, loan applications, and copies of submissions to FHA, GNMA, FHA insurance claims and claim records.

See Warrant ¶6. Further, the warrant provided that "[a]ll of the above listed documents may be found in written or electronic form." *Id.* ¶ 12.Thus, as practically all of Logan-Laws' business dealt with Title I mobile home financing under FHA and GNMA, this warrant, similar to the warrant in *Henson,*

effectively encompasses the bulk of the documentation stored by the company in its files as well as its computers.

However, as set forth in *Savoca* and reiterated be *Henson*, where the discretion of what shall be seized is taken from the hands of the officer executing the warrant due to the particularity of the items listed, the questions turns to whether there was probable cause to support such a broad warrant, regardless of the inclusiveness of the items listed. *Savoca,* 761 F.2d at 299; *Henson,* 848 F.2d at 1383. This, precisely, is the situation at hand, as the warrant, though vastly inclusive, specifically stated the items to be seized.

Turning to the issue of whether there was probable cause to support this warrant, the Supreme Court noted in *Anderson v. Maryland,* 427 U.S. 463,481 n.10 (1976) that "[t]he complexity of an illegal scheme may not be used as a shield to avoid detection when the State has demonstrated probable cause to believe that a crime had been committed and probable cause to believe that evidence of this crime is in the suspect's possession." *Id.* Thus, we return to the question of whether the warrant was as "specific as the nature of the activity under investigation permitted." *Henson,* 848F.2d at 1383 (quoting *United States v. Shoffner,* 826F.2d 619 (7th Cir.), *cert. denied sub nom. Strange v. United States,*---U.S.---, 108 S. Ct.356 (1987).

As the Sixth Circuit stated in *Henson*. "[w]here the precise identity of goods cannot be ascertained at the time the warrant is issued, naming only a generic class of items will suffice."*Id.* (quoting *United States v. Porter,* 831 F.2d 760 (8th

Cir. 1987). Because of the complex nature of the criminal scheme in the present case, the warrant could not have been more specific as to the identity of the documents to be seized. Even with the aid of the confidential informants who provided the information upon which the affidavit in support of the warrant was based, the officers could not have known precisely where and in what form documentation of this scheme existed. For example, according to the statements of one informant, the checks used to make payments to delinquent borrowers' accounts were returned to Logan--Laws and stored "with other records...in the second floor storage area," which also housed all the "records dating to the beginning of the Logan-Laws Corporation."*See* Affidavit in Support of Warrant ¶ 30. Theses records also included, amidst mountains of paperwork, evidence, in unknown forms, of fraudulent loan payments and filings with FHA and GNMA. Hence, naming the general class of items, such as all documents related to the HUD, FHA, and GNMA transactions and loan payments, was as specific as possible, and thus reasonable under the circumstances. The warrant, therefore, sufficiently stated the items to be seized, even though it effectively encompassed the bulk of the company's records.

Defendants argue that the officers could have made the warrant more specific by including a restrictive date as to the time period during which the alleged wrongdoings occurred. Defendants further contend that the absence of such a date created a warrant that was not wholly supported by probable cause and facially deficient. As a result, defendants urge that evidence seized by the warrant should be excluded. In support of this contention, defendants adamantly rely on the Ninth Circuit

case of *United States v. Kow*, 58 F3d 423 (9th Cir. 1995), in which the facts are very similar to the case at hand. In *Kow*, a warrant was executed to seize evidence related to a conspiracy to defraud the IRS. As in this case, the warrant in *Kow* was specific as to the documents to be seized but encompassed virtually all of the company's records. In addition, the warrant in *Kow* notably lacked a restrictive date. In finding the warrant invalid, the Ninth Circuit pointed to the fact that the warrant "sought to describe every document on the premises and direct that everything be seized." Also, the Court pointed to the fact that the warrant "sought to describe every document on the premises and direct that everything be seized." Also, the Court pointed out that the warrant in *Kow*, unlike the warrant in the case, was not aimed at the specific conduct in question. *Id.* at 427. The lack of a restrictive date, therefore, was but one contributing factor in the Ninth Circuits' decision.

In the present case, the warrant was not aimed at seizing all of the records in the Logan-Laws office but was particularly directed at FHA, GNMA, and HUD related documents. While this description included practically all of Logan-Laws' records, it was necessitated by the nature of Logan-Laws' business.

Moreover, in *Kow*, the affidavit stated in detail the locations and descriptions of the documents sought to be seized, leaving no reason for this information to be excluded from the warrant. *Id*. By contrast, in this case, the locations of the documents were only generally averred in most instances, *see* Affidavit in Support of Warrant ¶¶ 28-30, and could not have been more specifically stated in the warrant.

Defendants, nonetheless argue that the government knew, through the affidavit, of account numbers and names of accounts involved in the fraudulent activity. *See* Affidavit in Support of Warrant ¶ 24 (informant provided affiant with computer printout of certain account records labeled as "special handling accounts"). However, there is no reason to believe that this information was inclusive of the evidence located at Logan-Laws. In fact, the information provided in the affidavit and upon which defendants rely in making this argument actually buttresses the level of probable cause, since it is evidence of Logan-Laws' propensity to commit fraud.

This Court is perplexed by the defendants' consistent dependence on Ninth Circuit decisions and disregard for the Sixth Circuit precedent set forth in *Henson*. Nevertheless, again relying on *Kow* and another Ninth circuit case, defendants contend that the government can only support a request for a warrant lacking in particularity by asserting in the affidavit that the place to be searched was "permeated with fraud." *See Kow*, 58 F.3d at 428; *Center Art Galleries v. united States*, 875 F.2d 747, 750-51 (9th Cir. 1989). This argument must fail for two reasons.

First, while the notion of "permeated with fraud" may have been accepted by the Ninth Circuit, followed by the First Circuit in *United States v. Brien*, 617 F.2d 299, 308-309n.11(1st Cir.), *cert. denied*, 446 U.S. 919,100 S.Ct. 1854,64 L.Ed.273 (1980), and the Second Circuit in *National City Trading Corp. v. United States*, 635 F.2d 1020,1026 (2d Cir. 1980), it has never been accepted, or even cited, by the Sixth Circuit. Furthermore,

the Sixth Circuit had ample opportunity to consider this doctrine in *Henson,* but instead adopted the test of whether the warrant was as "specific as the nature of the activity under investigation permitted. "*Henson,* 848 F.2d at 1383 (citations omitted).

Second, even if the doctrine of "permeated with fraud" were adopted by this district, the circumstances of this case would fulfill the requirements, with the exception of "permeated with fraud" being specifically averred in the affidavit for the warrant. Defendants again cite the Ninth Circuit in its attempt to apply the test of "permeated with fraud' to the case at hand. In *Center Art Galleries v. United States*, 875 F.2d 747 (9th Cir. 1989), the Ninth Circuit found that an art gallery accused of forging Salvador Dali artwork was not so "permeated with fraud" as to warrant a seizure of "five truckloads of documents, artwork, and other property. "*Id.* at 749. However, the court, in making this decision, pointed out that the forgeries were limited to the works of Dali, and only twenty percent of the gallery's business involved Dali. The present case is clearly distinguishable, as the fraud at Logan-Laws involved its dealings with HUD, FHA, and GNMA, which constituted virtually all of the company's business. Therefore. whether it was specifically averred in the affidavit, which is still not a requirements in this circuit, Logan-Laws was necessarily "permeated with fraud.

III. Good Faith

While it is clear that there was probable cause to support such an encompassing warrant in this case, and that the warrant here was as particular as possible under the circumstances with

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respect to the type of items to be seized, the issue of the absence of a restrictive date in the warrant still remains. The court must look at the purpose of the exclusionary rule and the 'good faith' test under *United States v. Leon,* 468 U.S. 897 (1984), to decide if the absence of a date necessitates the exclusion of the fruits of the warrant.

The Supreme Court in *Leon* noted that the Fourth Amendment has not been interpreted to require the exclusion of evidence obtained in violation of the amendment. *Id.* at 906. Further, the rule of exclusion is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than personal constitutional right of the party aggrieved." *Id.* (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)). Nevertheless, the rule has been applied toe exclude seized evidence from use a trial, due to the invalidity of a warrant. The application of the rule of exclusion, however, has been limited to situations in which its purpose – the deterrence of police misconduct in obtaining and executing warrants – is further served. *Id.* At 918.

In *Leon*, the Supreme Court considerably restricted the rule of exclusion by adopting a "good faith test" to determine the benefit of applying the rule. The test of good faith is applied to the officers involved and not to the judges and magistrates who sign the warrants. The reason is primarily that the rule is intended to deter police misconduct and not the conduct of judges or magistrates. *Id.* at 916. Thus, "if the exclusion of evidence obtained pursuant to a subsequently invalidated warrant is to have any deterrent effect . . . it must alter the

behavior of individual law enforcement officers or the policies of their departments." *Leon* at 918. The Court concluded that suppression should be ordered on a case-by-case basis and "only in those unusual cases in which exclusion will further the purposes of the exclusionary rule." *Id.*

The Supreme Court further reasoned that the purpose behind the e exclusionary rule inherently assumes that the actions of the law enforcement officer were willful, or at least negligent, and that, where the officers have acted in good faith and without wrongdoing, the deterrence effect is minimized. *Id.* at 919 (quoting *United States v. Peltier*, 422 U.S. 531, 539 (1975)). Thus, where "the officer is acting as a reasonable officer would and should act in similar circumstances. . . [e]xcluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty." *Id.* at 920 (quoting *Stone v. Powell*, 428 U.S. 465, 539-40 (1976) (White, J. dissenting)).

The Court did not stop there in its rationale, but concluded that, ordinarily, an officer is not expected to second-guess the judge's or magistrate's finding of probable cause or judgment that the form of the warrant is sufficient, provided that the officer acted in good faith in applying for the warrant. Further, "penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." *Id.* at 921. This, however is not to say that there will be free reign for invalid warrants. There are four areas to which the Supreme Court pointed where the good faith exception will not apply. First, suppression is

appropriate if the judge or magistrate is misled by the officers. *See Franks v. Delaware*, 438 U.S. 154 (1978). Second, the exception will not apply if the judge or magistrate abandons his or her "detached and neutral" position. *See Lo-Ji Sales, Inc. v. New York*, 422 U.S. 319 (1979). Third, evidence should be excluded where the warrant is based on an affidavit "so lacking in indicia of probable cause as to render the official belief in its existence entirely unreasonable." *Brown v. Illinois*, 422 U.S. 590, 610-11 (1975) (Powell, J. concurring in part). Finally, evidence will be suppressed where a warrant is "so facially deficient that the executing officers cannot reasonably presume it to be valid." *Leon*, 897 U.S. at 923 (citing *Massachusetts v. Shepard*, 468 U.S.981 (1984)). In none of these situations should a court consider the officers to have acted in reasonable good faith.

Turning to the case at hand and the issue of the absence of a restrictive date, defendants argue that the warrant, due to its breadth, is so "facially deficient that the executing officer could not have reasonable [sic] relied on the warrant in good faith. There is no reason to believe that the district judge was misled or that he was acting outside of his detached and neutral role, and, as previously stated, there clearly was probable cause to support the issuance of the warrant.

The government conceded during oral arguments that the absence of a date was an oversight. However, there is no reason to believe that, after having the warrant signed by a district judge, the officer could not have reasonably relied on the validity of the warrant merely because there was no restrictive

date. Considering the complexity of the fraudulent scheme involved and the magnitude of the warrant at issue, a reasonable law enforcement officer, having not misled the judge or acted in any other form of bad faith, should not be expected to question the legal knowledge of a federal district court judge. As such, excluding the evidence in question would not serve to deter future Fourth Amendment violations, but only to deter the officers from performing their duties.

The Supreme Court in *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), set out an example of "good faith" behavior on the part of a law enforcement officer. In *Sheppard*, an officer, because it was Sunday, had difficulty in procuring a warrant form from his district. The officer finally found a form used in another district and altered it to fit his occasion. Upon delivering the warrant to a judge, the officer explained the situation and noted that the warrant form may need additional corrections. The judge replied that he would correct any mistakes, but when the warrant was signed there were still significant errors on the form. *Id.* at 985. The Supreme Court ruled that the warrant was not facially deficient that a reasonable officer would not have relied on it, even though the officer may have been aware of some deficiencies in the warrant when it was presented to the judge. *Id.* at 990.

In the present case, this court is hard pressed to believe that a reasonable officer would question the authority of a district judge based upon an oversight such as a missing date, but not where the officer had express knowledge that a warrant application may have contained deficiencies before it was

submitted to the judge. Therefore, defendants' contention that the warrant was "facially deficient" to the extent that a reasonable officer could not rely on it must fail.

IV. The Optical Disk

Defendants argue that the seizure of the optical disk, upon which data from Logan-Laws' file server was stored, exceeded the scope of the warrant and should therefore be suppressed. Defendant Laws attempts to analogize the instant situation with *In re Subpoena Duces Tecum*, 846 F.Supp 11 (S.D.N.Y. 1994), where the district quashed a grand jury subpoena as overbroad because it demanded computer disks that contained irrelevant information. That case, however, can be distinguished from the matter at hand in two respects. First, *In re Subpoena duces Tecum*, it appears that the government counsel knew that the subpoena demanded irrelevant documents. Second, "the government . . . Acknowledged that a 'key word' search of the information stored on the devices would reveal 'which of the documents are likely to be relevant to the grand jury's investigation.'" *Id.* at 13 (quoting *In re Horowitz*, 482 F.2d 72, 79 (2d Cir.), *cert. denied*, 414 U.S. 867, 94 S.Ct. 64, 38 L.Ed.2d 86 1973)).

In the present case, there is no evidence that the government agents involved in the search of the premises of Logan-Laws knew that irrelevant information was being demanded. Likewise, it does not appear that the government could have conducted a "key word" search similar to that in *In re Subpoena duces Tecum* due to the pervasiveness of the

alleged criminal conduct. *See* Affidavit in Support of Warrant. The district court's decision in *In re Subpoena Duces Tecum* was based primarily on these two factual occurrences. Since these circumstances are absent from the present situation, this court finds that defendant's reliance on that case is misplaced.

Furthermore, the warrant expressly authorizes the seizure of information regarding the alleged criminal activity stored in electronic or magnetic form. *See* Search Warrant ¶1. For the reasons given above, such broad language was justified under the circumstances. The optical disk clearly falls within this language and, therefore, within the scope of the warrant.

"[T]he ultimate measure of the constitutionality of a governmental search is 'reasonableness.'" *Vernonia School Dist. 47J v. Acton*, 115 S.Ct. 2386, 132 L.Ed.2d. 564 (1995). The extensive nature of the alleged criminal activity combined with the exclusive character of Logan-Laws' business created a unique situation that made seizing the optical disk entirely reasonable. The government alleges that Logan-Laws regularly falsified loan documents filed with the FHA and fraudulently manipulated its records to comply with the requirements of GNMA. Logan-Laws' entire business consisted of providing loans to mobile home buyers, which were insured against losses under the Title I insurance program of the FHA. These factors, taken together, justifiably implicate most of the date generated by Logan-Laws. Since Logan-Laws utilized its networked computer system to carry out these alleged activities, seizing the optical disk that stored large portions of the data in question was unreasonable.

Additional support for this contention can be seen in light of the unreasonableness of the alternative – allowing government agents unlimited access to the Logan-Laws files server for an indeterminate period of time. To have required the agents to wade through the tremendous amount of data stored in the Logan-Laws computer files would have been impracticable. *See United States v. Henson*, 848 F.2d 1374 (6th Cir. 1988). Furthermore, the complete monopolization of the file server that would surely have been required for such a search would have caused the daily activities of Logan-Laws to grind to an immediate halt. This court does not find either of these scenarios sensible and views the seizing of the optical disk as, by far, the lesser intrusion. It is, therefore, the decision of this court that the seizure of the optical disk was reasonable and therefore not unconstitutional.

V. Conclusion

Therefore, for the reasons stated above, the defendants' motion to suppress evidence will be denied.

Order Accordingly,

/s/
James H. Jarvis
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
GREENEVILLE

FILED
JUL 14 8:34 AM '99
U.S. DISTRICT COURT
EASTERN DIST. OF TENN.
BY DP, DEP. CLERK

UNITED STATES OF AMERICA	)
	)
	)
v.	) NO. 2:96-cr-17
	)
	)
JOHN M. LOGAN and	)
ALAN MICHAEL LAWS	)

MEMORANDUM AND ORDER

On May 14, 1998, a jury convicted defendants John M. Logan and Alan Michael Laws on ninety-four counts of conspiracy, false reports, and false statements arising from a scheme to defraud the Department of Housing and Urban Development. Currently pending is defendant Law's [sic] motion for permission to communicate with jurors [Doc. No. 347]. For the reasons that follow, this motion will be denied.

Local Rule 48.1, Eastern District of Tennessee, governs post-verdict communications with jurors and provides that:

> No attorney, party, or representative of either may interrogate a juror after a verdict has been returned or the trial has been otherwise concluded, without prior permission of the court.

LR 48.1 (E.D. TN.). Such rules are intended to protect the integrity of jury verdict by preventing "a fishing expedition in an effort to find material to impeach the verdict by testimony of a juror. . . " *United States v. Mitchell*, 511 F.2d 25, 37-38 n. 18 (6th Cir. 1975). *See also United States v. Holloway*, 166 F.3d 1215, 1998 WL 833767, slip op. at 5 (6th Cir. 1998). Post-verdict inquiries are further limited by Rule 606(b), Federal Rules of Evidence which allows jurors to testify only as to "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." Finally, it is well established that allowing the post-verdict interrogation of jurors is firmly committed to the discretion of the trial judge. *Mitchell*, 511 F.2d 25, 38 (citations omitted).

Defendant relies on *United States v. Resko*, 3 F.3d 684, 695 (3d. Cir. 1993), which recognizes that jury verdicts may be challenged in cases of premature deliberations or external influences on the jury. *Resko*, however, involved a situation in which "unequivocal proof of jury misconduct [was] discovered mid-trial." *Id.* at 694. A juror in the *Resko* case had notified a

court officer, on the seventh day of a nine-day trial, that some members of the jury had been discussing the case. *Id.* at 687. The court notes that investigations into intra-jury misconduct are much more appropriate "when the misconduct is alleged mid-trial rather than post-verdict, when the district court's inquiry will likely be less productive while consuming more time and resources." *Id.* at 695.

In the instant case, defendant Laws did not allege any juror misconduct during the trial, and does not allege any now. The defendant's motion and supporting brief provide no grounds upon which post-verdict interrogation should be granted, except to note that only by communication with the jurors could defendant's counsel discovery if there had been any external influences on jurors. The same is true of every case, however, and granting defendant's motion on these grounds alone would potentially open up any jury verdict to impeachment. This would undermine the court's ability to protect the integrity of jury verdicts, and subject any verdict to the kind of "fishing expeditions" mentioned in *Mitchell*, 511 F.2d at 37-38 n. 18 (6th Cir. 1975). Accordingly, defendant's motion is hereby DENIED.

ENTER:

/s/
JAMES H. JARVIS
United States District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
GREENEVILLE

FILED

JUL 28 9:28 AM '99
U.S. DISTRICT COURT
EASTERN DIST. OF TENN.

BY CL DEP. CLERK

UNITED STATES OF AMERICA	)	
	)	
	)	
v.	)	No. CR 2-96-17
	)	(Jarvis)
	)	
JOHN M. LOGAN,	)	
ALAN MICHAEL LAWS	)	

MOTION TO ALTER OR AMEND ORDER OF JULY 14, 1999 DENYING PERMISSION TO INTERVIEW JURORS

Comes the Defendant, Alan Michael Laws, through undersigned counsel, and submits this Motion to Alter or Amend this Court's July 14, 1999 Memorandum and Order denying

counsel for Mr. Laws permission to interview the jurors in this case. [hereinafter "Order"]

In support of this motion, Mr. Laws avers the following:

1. This Court denied Mr. Laws permission to communicate with the jurors in this case because Mr. Laws had not made any showing of juror misconduct. Order at 2-3.

2. As was previously described in Mr. Laws original Motion to Communicate with Jurors, previous trial counsel for Mr. Laws had spoken with a juror in a good faith belief that permission had already been granted by this Court.[3] Affidavit of Robert W. Ritchie, attached.

3. During this initial communication with this juror, it was learned by counsel that the jury in this case routinely discussed the evidence among themselves during the course of the entire trial, effectively "deliberating" prior to the close of all evidence and prior to this Court's final jury instructions. See Affidavit of Robert W. Ritchie, attached.

4. Deliberations by the jury during the course of a trial and prior to the jury charge can prejudice a defendant's Sixth and Fifth Amendment rights to a fair trial before an impartial jury. See, e.g., United States v. Resko, 3 F.3d 684, 695 (3d Cir. 1993) (and reasons cited therein); United States v. Wiesner, 789 F.2d 1264, n.3 (7th Cir. 1986) (requiring instruction not to

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[3] After these early communications, however, counsel has made no further contact pending formal permission by this Court.

deliberate prior to presentation of all of the evidence); Lilian B. Hardwick & B. Lee Ware, Juror Misconduct § 7.04, at 7-27 (1988); Propriety and effect of Juror's Discussion of Evidence Among Themselves Before Final Submission of Criminal Case, 21 ALR 4th (and cases cited therein).

5. Because of this clear showing of jury misconduct, Mr. Laws submits that this Court alter or amend its prior order and allow counsel for Mr. Laws to interview the jurors. See United States v. Shackelford, 777 F.2d 1141, 1144 (6th Cir. 1985) ("When possible juror misconduct is brought to the trial judge's attention he has a duty to investigate and to determine whether there may have been a violation of the sixth amendment.")

6. Should this Court grant permission for Mr. Laws' counsel to communicate with the jurors in this case, counsel will inform the respective juror that he or she is under no obligation to talk with counsel. Furthermore, counsel will answer any clarifying questions a juror might have before communicating with the juror in any depth. Should the juror indicate that he or she does not wish to communicate with counsel, counsel will immediately cease contact with the juror. This procedure should allay any concerns of the government that counsel for Mr. Laws will "harass[] the jurors." (Government's Response at 2).

Accordingly, Mr. Laws respectfully requests this Court alter or amend its Memorandum and Order of July 14, 1999 and issue an order granting permission for Mr. Laws' counsel to communicate with the jurors in this case.

Respectfully submitted,

RITCHIE, FELS & DILLARD, P.C.

By: RICHARD L. GAINES
W. THOMAS DILLARD, #2020
RICHARD L. GAINES, #015462
Counsel for Alan Michael Laws
606 W. Main Street, Suite 300
P. O. Box 1126
Knoxville, TN 37901-1126

FILED
JUL 29 4:41 PM '99

U.S. DISTRICT COURT
EASTERN DIST. OF TN

BY BP DEP. CLERK

"Granted in margin by Judge's signature"

DENIED: 7-29-99

JAMES H. JARVIS, JUDGE

CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing has been forwarded this 27 day of July 1999 to Marvin Neil Smith, Esq., Assistant United States Attorney, 103 W. Summer Street, Greeneville, TN 37743; John T. Milburn Rogers, Esq., Jerry Wayne Laughlin, Esq., 100 S. Main St., Greeneville, TN 37743.

/S/
RICHARD GAINES

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE

FILED
JUL 28 9:28 AM '99
U.S. DISTRICT COURT
EASTERN DIST. OF TENN

BY __CL__ DEP. CLERK

UNITED STATES OF AMERICA	)	
	)	
	)	
v.	)	No. CR 2-96-17
	)	(Jarvis)
	)	
JOHN M. LOGAN,	)	
ALAN MICHAEL LAWS	)	

AFFIDAVIT OF ROBERT W. RITCHIE

In this cause came Robert W. Ritchie, being first duly sworn, who deposes and says:

(1) That he was an attorney of record in the above-styled case for the trial of this cause.

(2) On the 14th day of May, 1998, John M. Logan and Alan Michael Laws were convicted of the charges brought in the indictment returned in this cause.

(3) After the verdict was returned, the court advised the jurors that they did not have "to discuss this case with anyone unless [they] wished, unless [they] wanted to; and if these lawyers have any other cases involving your jury panel, they know not to discuss it with you until after your time has been released . . . ."

(4) On or about May 20, 1998, not having any other cases involving the jury panel, I had a conversation with Mr. Bob Akers, foreperson of the trial jury.

(5) In the course of the pleasant conversation, I commented that at a time convenient with him I would like to continue the conversation.

(6) A few days before March 31, 1999, Mr. Akers called me and asked if I was still interested in continuing the conversation that we had had several months ago. I told him that I was but just had not had the opportunity to get back in touch.

(7) As a result of our conversation, I met with Mr. Bob Akers at the Cracker Barrel restaurant near Kingsport, Tennessee, on the 31st day of March, 1999.

(8) In the course of the conversation Mr. Akers informed me of various thoughts and observations that he had during the course of the trial, the conduct of counsel, and the impact of certain evidence. After almost an hour of such conversation, Mr. Akers happened to mention that he had been selected as foreperson of the jury at the first part of the trial. As the conversation proceeded, Mr. Akers disclosed the following:

(a) From the time that he was selected as foreperson, a day or so after the trial started, the jury regularly discussed the evidence as it was being introduced.

(b) The jury always discussed the evidence in the jury room, never in public, such as at lunch, on the street, or in the hallway.

(c) The discussions by the jury were carried out as each witness testified. The discussions were organized in that Mr. Akers, as foreperson, presided over the discussions and

encouraged those who were not participating in the discussion of the evidence to participate. He commented, when a juror was sitting back and not participating, he would remind them that, as jurors, they had an obligation to participate and would draw them into the discussion.

(d) The discussions of the jurors centered around their evaluation of the testimony, the credibility of the witnesses, and they sought to understand that evidence from their own background and experiences.

(e) The discussions continued in the jury room during recesses and at other times when the jury gathered in the jury room, throughout the trial and encompassed a substantial part of the testimony as it was being introduced.

(f) The jury did not consider their activity to be "deliberations" and were not aware that this manner of considering the evidence was not in accordance with the accepted procedure or instructions of the court.

(g) Mr. Akers had some difficulty in recalling details of the things that were discussed but felt that some of the

other jurors would be willing to collectively meet with counsel and discuss what they recalled about the ongoing discussions that occurred during the trial regarding various aspects of the evidence that was then being introduced.

And further affiant saith not.

/s
Robert W. Ritchie

STATE OF TENNESSEE
COUNTY OF KNOX

Sworn to and subscribed before me this 23rd day of July, 1999.

Karen E. Montooth
Notary Public

My commission expires: 3/27/2002

UNITED STATES CONSTITUTION
ARTICLE IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

UNITED STATES CONSTITUTION
ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

UNITED STATES CONSTITUTION
ARTICLE VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall be been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

FEDERAL RULES OF EVIDENCE
RULE 606(b)

(b) **Inquiry into validity of verdict or indictment.** Upon an inquiry into the validity of a verdict or indictment, juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent form the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

LOCAL RULES
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE

LR48.1 Jurors

No attorney, party, or representative of either may interrogate a juror after a verdict has been returned or the trial has been otherwise concluded, without prior permission of the court.